Supreme Court, U.S.
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No. 05-262

In The

Supreme Court of the United States

AMANDA DUTTON,

Petitioner,

v.

UNIVERSITY HEALTH CARE SYSTEMS, L.L.C. D/B/A TULANE UNIVERSITY HOSPITAL AND CLINIC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Fed. R. Civ. P. 56 require the name of an affiant be included on a witness list in order for the affidavit evidence to be used in support of an opposition memorandum to a summary judgment motion?

2. Under the Family Medical Leave Act, 29 U.S.C. § 2615 *et seq.* (1993), is direct evidence of discriminatory intent required to avoid summary judgment for the employer?

3. Under the Americans With Disabilities Act, 42 U.S.C. § 12203(b) (1990), is evidence of the employer's mendacity regarding the reasons given for an employee's termination, sufficient to avoid summary judgment in regard to an employer's perception of a disability?

LIST OF PARTIES

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Tulane University Hospital and Clinic

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and attached as appendix 1-19 as are the opinions of the United States District Court for the Eastern District of Louisiana, which are appendix 20-56.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 29, 2005, by Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes construed are the Family Medical Leave Act, 29 U.S.C. § 2615 *et seq.* which states: "It shall be unlawful for an employer – (1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such";

The Americans with Disabilities Act, 42 U.S.C. § 12203 *et seq.*, which states: "it shall be unlawful to . . . interfere with any individual in the exercise of . . . any right protected under this chapter";

The Equal Employment Opportunity Commission Interpretative Regulations, 29 CFR pt. 1630 App. § 1630(2) which states: "if an employer cannot articulate a non-discriminatory reason for the employment action, an

inference that the employer is acting on the basis of "myth", fear, or stereotype can be drawn"; and

Fed. R. Civ. P. 56(e) which states: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein ... affidavits ... must set forth specific facts showing that there is a genuine issue for trial."

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Louisiana found that Petitioner, Amanda Dutton, despite creating a genuine issue of material fact regarding the truthfulness for the reasons given for her termination, failed to produce evidence of discriminatory or retaliatory intent for her use of the Family Medical Leave Act (FMLA) (App. 52). The Court disregarded Dutton's evidence of pretext, and medical documentation stating Dutton could not work during her FMLA leaves. The Court concluded Dutton failed to prove Tulane regarded her as having a disability (App. 40). Lastly, the Court struck the affidavit of Rose Klein. The affidavit stated Mary Failla, Dutton's and Klein's supervisor, discouraged Klein's use of the FMLA which was needed to have knee replacement surgery. The Court failed to consider the affidavit as evidence, because Klein's name had not been timely listed on the witness and exhibit list submitted for trial (App. 25). The United States Court of Appeals for the Fifth Circuit concurred with the District Court's Opinion. (App. 13, 14, 17).

Facts

Petitioner, Amanda Dutton, worked as a collection supervisor for Tulane Hospital, a hospital owned by HCA, Inc. In June of 2001, Dutton underwent an appendectomy, myomectomy, and removal of endometriosis, all major surgical procedures. Returning to work in August of 2001, Dutton, without prior warning, received written disciplinary action for alleged poor performance. These alleged examples of poor performance were found while Dutton was on leave. During Dutton's leave, Mary Failla, Dutton's supervisor and the Director of Tulane's Business Services, failed to assign an employee to collect Dutton's accounts, accounts which numbered over 1100 upon Dutton's return. Due to complications from her June surgery, Dutton underwent medical tests in October of 2001, causing the use of additional FMLA leave for one week. Less than two months after this second leave, Failla terminated Dutton, citing the number of uncollected accounts left in Dutton's file tracks as the reason.

Dutton presented several pieces of evidence to refute Tulane's defense of Dutton's poor performance. Failla left Dutton's accounts uncollected while she was on leave; Dutton's counterpart, collection supervisor Sarah Lewis, performed at a lower level than Dutton, and was not disciplined; Dutton had no previous written warnings or disciplinary actions regarding her work in her personnel file; the affidavit of Rose Klein, stating Failla discouraged Klein from taking FMLA leave because she was needed at work; and the Department of Labor's investigative determination, concluding that

Dutton had been the victim of retaliation and discrimination under the FMLA.[1] (App. 12-13; App. 58-60).

The United States Court of Appeals for the Fifth Circuit, without the affidavit of Rose Klein, agreed that Dutton produced evidence to create a genuine issue of material fact regarding the truthfulness of Tulane's reasons for terminating her employment, but failed to produce evidence that Tulane discriminated against her for using the FMLA. Further, the Fifth Circuit concluded that Failla could not have perceived Dutton as having a disability because Failla did not regard Dutton as being prevented from working a broad range of jobs (App. 17).

REASONS FOR ALLOWANCE OF WRIT

Whether a district court should consider competent affidavit evidence in summary judgment proceedings even though the name of the affiant was not included on the witness and exhibit list for trial, is an important question implicating the way summary judgment motions are decided. Fed. R. Civ. P. 56(e) mandates that the affidavits used to counter motions for summary judgment need only be of personal knowledge and meet the standards under the evidence rules. However, the rule does not mandate that the name of the affiant be included on a witness list in order for the affidavit to be considered as evidence in summary judgment proceedings. The only purpose of the summary judgment rule is to enable a party to be freed from sham claims or defenses presented by her

[1] The District struck the report as evidence because the report had not been listed on the witness and exhibit list for trial (App. 25-26).

adversary, and from the expense and inconveniences of a trial. While Rule 56 is designed to efficiently resolve issues. Rule 56 was not designed to strip a person from his day in court when sufficient, relevant evidence has been produced to refute the motion. The application of Rule 56 must comport with due process and the Seventh Amendment. Failure to allow a party to use all evidence available to her under Rule 56 undermines the litigation process, especially since this Court has stated "[the] submission of countering affidavits is necessary to avoid summary judgment." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970).

Likewise, it is important for this Court to clarify whether an employee who proffers evidence supporting the likely falsehood of the reason given for an adverse employment action, will defeat a summary judgment motion in claims alleging retaliation and discrimination under the FMLA and the ADA. Again, the permitted use of Rule 56 is at stake, particularly in employment cases, in w..ch proof of liability often depends on the credibility of witnesses. Summary judgment is only used to dispose of cases which lack a disputed material fact. If a reasonable person can disbelieve the only reason articulated by an employer for an adverse action taken against an employee in a protected class, that reasonable person can also infer the reason for the falsehood was to hide an unlawful motive. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 536, 113 S.Ct. 2742, 2763, 125 L.Ed. 2d 407 (1993). When a litigant produces evidence suggesting more likely than not unlawful action has taken place, summary judgment should not preclude a full trial or at the very least, the possibility of settlement.

I. REVIEW IS WARRANTED TO RESOLVE WHETHER FED. R. CIV. P. 56(e) REQUIRES THE NAME OF AN AFFIANT BE INCLUDED AS A WITNESS ON A WITNESS AND EXHIBIT LIST IN ORDER FOR THE AFFIDAVIT TO BE CONSIDERED AS EVIDENCE IN SUMMARY JUDGMENT PROCEEDINGS.

Without considering the affidavit of Rose Klein, the Fifth Circuit agreed that although Dutton produced sufficient evidence for a jury to disbelieve Tulane's reasons for her termination, she did not produce sufficient evidence to convince a jury that discrimination was the intent. The United States District Court for the Eastern District of Louisiana struck the affidavit of Rose Klein because the amended witness and exhibit list, containing her name, was untimely submitted. Klein, the former Assistant Admitting Director, who reported directly to Failla, suffered from severe knee arthritis and needed knee replacement surgery (App. 58-60). On three occasions, Failla told Klein, she could not take FMLA leave to have knee replacement surgery because her services were needed at work. Failla also asked Klein to investigate other methods to treat her arthritis (*Id.*). The Fifth Circuit ignored this issue, which was timely raised on appeal.

The Sixth Circuit stated in *Ryder Auto Carrier Group, Inc. v. General Teamsters Sales & Serv.*, 124 F.3d 199 (6th Cir. 1997), that Rule 56 does not require the names of affiants be included on a witness list before the affidavits are used to support a motion for summary judgment. Likewise, the Eleventh Circuit remanded a case to the district court for failure to consider an affidavit that was stricken from the record for failure to comply with the

scheduling order. *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986) (*reversed on other grounds*).

The failure of the Court to consider the Klein affidavit defeats the purpose of Fed. R. Civ. P. 56. This Court has held that one of the purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Further, this Court has stated that the purpose is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case, to demand at least one sworn averment of that fact before the lengthy process of litigation continues. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-889, 110 S.Ct. 3177, 111 L.Ed. 2d 695 (1990). The Court's action of striking evidence that can persuade a fact finder of an employer's propensity of discriminatory intent simply because the name of the affiant did not appear on a witness and exhibit list, precludes the possibility of settlement for those litigants who otherwise would be successful in defeating summary judgment motions in discrimination cases. Further, this action erodes the very purpose of Rule 56 and the Seventh Amendment which gives the litigant a right to a jury trial.

II. THIS COURT SHOULD GRANT CERTIORARI SINCE THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER PROOF OF MENDACITY IS SUFFICIENT TO PRESENT AN EMPLOYMENT RETALIATION AND DISCRIMINATION CASE TO THE JURY UNDER RULE 56.

In regard to the evidence necessary to create a factual issue under the Age Discrimination Act, this Court has stated:

> . . . [under the] "burden shifting analysis, the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence". *Reeves v. Sanderson Plumbing Products, Inc.* 530 US 133, 147; 120 S.Ct. 2097, 2106, 147 L.Ed. 2d 105 (2000).

Some circuits have held that the elements of a prima facie case, plus evidence of pretext, are sufficient to create a jury issue in a discrimination case. See *Wood v. Dollar Rent-A-Car Systems, Inc.*, 128 Fed. Appx. 620, Slip Copy, 2005 WL 902093 (9th Cir. 2005), stating if a plaintiff meets her prima facie case and proves reasons for termination are false, she has met her burden at the summary judgment phase; *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 n. 3 (10th Cir. 1994); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951-52 (3rd Cir. 1996); *DeBoer v. Musaski Auto Parts, Inc.*, 124 Fed. Appx. 387, Slip Copy, 2005 WL 434526 (6th Cir. 2005).

Other circuits, including the Fifth Circuit, require evidence of direct discrimination or retaliation. See *Schnable v. Abramson*, 232 F.3d 83, 88 (2nd Cir. 2000) holding "nevertheless, plaintiff has not demonstrated that the pretextual reasons were intended to mask discrimination"; in a FMLA case, a slight suggestion of pretext, absent other evidence of discrimination does not meet plaintiff's ultimate burden, *Weston-Smith v. Cooley Dickerson Hospital, Inc.*, 282 F.3d

60, 70 (1st Cir. 2002); weak evidence introduced by plaintiff that reason is false is not enough for jury; *Champman v. AI Transport*, 229 F.3d 1012, 1025 (11th Cir. 2000).

The Fifth Circuit, as did the District Court, held Dutton produced evidence to create an issue of material fact regarding the truthfulness of the reason given for her termination. (App. 14). Mary Failla's stated reason for terminating Dutton was the number of uncollected accounts in her file tracks. (Failla's Depo. p. 288). However, evidence produced by Dutton proves she worked within Failla's expectation of collecting fifty accounts per day, and two weeks prior to her termination, the 1100 uncollected accounts were reduced to 217 (Record Excerpt 4). Further, fifty of the sixty-six accounts evidenced on Failla's grid as Dutton's poor performance were accounts under $2,000, accounts which are collected by a Tulane independent contractor (Dutton Ex. 34). This evidence, coupled with the fact Dutton had no prior disciplinary actions regarding her performance, is sufficient to advance the case to a jury.

Likewise, the Fifth Circuit found Dutton failed to satisfy her burden of whether Tulane regarded her as being disabled. (App. 17). The Court said Dutton failed to produce evidence that Failla viewed Dutton as being incapable of working a broad range of jobs. The Court reached this concluson despite evidence of Dutton's inability to work at all while in surgery, while recuperating from surgery, and during additional testing as a result of complications from her surgery. This conclusion was also drawn despite Dutton's pretext evidence, and Rose Klein's testimony that Failla discouraged her from taking FMLA because she was needed at work.

> The Equal Employment Opportunity Commission interpretive regulations state: . . .
>
> "if an individual can show that the employer . . . made an employment decision because of a perception of disability based on "myth fear or stereotype", that individual will satisfy the "regarded as" part of the definition of disability . . . if an employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth", fear, or stereotype can be drawn" 29 CFR pt. 1630 App. §1630(2).

Despite this mandate several circuits have held that evidence of pretext is not sufficient for a jury to conclude that the employer perceived or regarded the employee as being disabled. See *Rakity v. Dillard Companies Inc.*, 302 F.3d 1152, 1165 (10th Cir. 2002), rejecting the holding that the issue of pretext concealed discrimination and the issue that the employer regarded the plaintiff as disabled; *Neese v. Nordic Const. Co.*, 405 F.3d 638, 642 (7th Cir. 2003), stating, "like the 10th circuit, we also decline to follow Ross." Also following suit is the holding by the First Circuit in *Sullivan v. Neiman Marcus Group, Inc.*, 358 F. 3d 110, 116 (2004), stating the employee's contention that he was fired for alcoholism was not sufficient to demonstrate that the employer considered the employee to be limited in the ability to work in a broad range of jobs.

However there are two circuits that follow the EEOC regulation. In *Heyman v. Queens Village Committee for Mental Health*, 198 F.3d 68, 73 (2d Cir 1999), the Court held that plaintiff's evidence of pretext could lead a jury to believe that the employer regarded the employee as being disabled. Likewise, the Sixth Circuit, in *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (2001) stated the

evidence of pretext may also tend to show *Campbell Soup* regarded plaintiff as being disabled.

Again these circumstances heavily implicate Rule 56 and summary judgment proceedings in discrimination and retaliation cases. These cases depend heavily on the credibility of witnesses because the intent of the actor has to be assessed. Summary Judgment is a mechanism that is used to discard cases which have no questions of fact in need of resolution. To the contrary, summary judgment should not be used to discard cases, wherein litigants have produced competent evidence that comports with the mandates of Rule 56. To do this deprives a litigant of her right to a jury, and, at the very least, an opportunity to settle the dispute, as most employers will not entertain settlement options until summary judgment issues have been decided.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30554

AMANDA DUTTON,

Plaintiff-Appellant,

versus

UNIVERSITY HEALTHCARE SYSTEM, L.L.C., d/b/a, TULANE UNIVERSITY HOSPITAL AND CLINIC,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana
No. 03-2084 D(4)

(Filed April 29, 2005)

Before KING, Chief Judge, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

Amanda Dutton ("Dutton") appeals from the district court's grant of summary judgment in favor of her former

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

employer, University Healthcare System, doing business as Tulane University Hospital and Clinic ("Tulane"), which dismissed her claims under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* We affirm the grant of summary judgment for essentially the same reasons as the district court.

BACKGROUND

Prior to her termination, Dutton worked as a supervisor in Tulane's Business Services Office ("BSO") from March 1999 to December 2001. Dutton was initially responsible for non-governmental billing and collections; her immediate supervisor was Mike Lane ("Lane"), Director of the BSO. The BSO reorganized in 2000, centralizing its billing and collections function at one location in Texas. The district court determined that Tulane gave Dutton and her colleagues notice that, as a result of the reorganization, their department would be closing.

In that same year, Lane was replaced by Mary Failla ("Failla") as Dutton's immediate supervisor. As part of Failla's own reorganization, Dutton lost supervisory authority over non-governmental billing, but kept supervision over non-governmental collections. To assist and educate personnel in the business office, Failla hired an outside consulting firm, Coast to Coast Consulting, Inc. ("Coast Consulting"). From October 2000 until mid-December 2000, Tulane alleges that Coast Consulting evaluated ongoing problems in the department, including problems with Dutton's performance and with her staff. The district court determined that despite Failla's efforts to improve Dutton's performance, Failla observed and

documented continued problems with Dutton and her staff in the area of collections and collection follow-ups.

In June of 2001, Dutton requested and was granted leave under the FMLA. Dutton's leave extended from June 20, 2001 to August 20, 2001, while she underwent removal of a fibroid tumor on her uterus. During Dutton's leave, Tulane contracted services for part of her duties to Advanced Receivables Strategy, Inc. ("ARS"), a company specializing in billing and collections. ARS' task was to perform many of Dutton's duties, offer suggestions on how to improve her staff's performance, and to train Dutton's staff to perform more efficiently. Tulane alleges that during Dutton's absences, two ARS employees, Elizabeth Mirck and Carlo Ianni, discovered serious deficiencies in Dutton's performances in the area of collections, including over 1000 of Dutton's accounts had not been worked-up and that Dutton had a backlog of mail that had never been opened. The ARS employees conveyed to Failla a list of violations by Dutton.[1] On August 20, 2001, Failla issued Dutton a written warning, listing all the violations communicated by the ARS employees. On August 21, 2001, the day Dutton returned from leave, Tulane alleges Failla presented Dutton with a list of the violations and the

[1] The violations include the following: Dutton (1) was not adequately reviewing collectors' work and interacting with them, (2) was not properly monitoring collectors' phone usages, (3) was not requesting implant invoices timely, (4) had not developed cardiac stent invoicing procedures, (5) had apparently no lines of communication between herself and her staff, (6) had failed to deal with a substantial amount of urgent and un-worked correspondence in her office from insurance companies and others who owed money to Tulane, (7) had no organized filing system for confidential personnel information, (8) had an unorganized work area, and (9) had failed to implement and monitor certain procedures, thereby causing redundant work for her and her collectors.

corrective actions to cure them. Tulane also alleges that Failla counseled her concerning the infractions. In a written memorandum, Dutton later denied most of the violations raised by Failla. In October 2001, Dutton requested a second leave from October 15, 2001 to October 22, 2001, to undergo additional medical procedures arising from, she claims, complications from the first medical procedure. Dutton was permitted to take the second leave, despite the fact that neither Dutton, nor Tulane, designated those absences as FMLA leave.

On November 1, 2001, Failla reviewed Dutton's file and discovered that over 1,000 accounts had not been worked-up. Failla requested Dutton to work-up the accounts by November 9, 2001. When Failla reviewed those files on November 9, she found that over 1000 accounts still had not been worked-up. The district court determined the dollar amount of the accounts amounted to $556,732.04. Dutton was subsequently terminated on December 4, 2001.

As a result of her termination, Dutton filed suit in the United States District Court for the Eastern District of Louisiana, alleging that Tulane violated § 2601-2654 of the FMLA by retaliating against her for taking protected medical leave. Dutton specifically contended that Tulane retaliated against her by: (1) writing her up after her return from FMLA leave; (2) failing to restore her to the position she held prior to her leave; (3) holding her to a higher standard of performance after her return from leave; and (4) terminating her shortly after returning from her second FMLA leave. Dutton also alleged that Tulane violated her rights under the ADA by discriminating against her because of her disability.

The parties subsequently filed opposing motions for summary judgment. After the district court granted Tulane's motion for summary judgment, Dutton filed this timely appeal. Dutton's appellate claims essentially contend that the district court: (1) erred in granting Tulane's motion for summary judgment on her FMLA and ADA claims; and (2) abused its discretion under the ADA in awarding expert costs. Tulane's motion for attorney's fees pursuant to 42 U.S.C. § 12205 of the ADA has been carried with the case.

STANDARD OF REVIEW

We review *de novo* a district court's grant of a motion for summary judgment, applying the same standard as the district court did in the first instance. *See Burge v. Parish of St. Tammany,* 187 F.3d 452, 465 (5th Cir. 1999). Summary judgment is appropriate where the moving party establishes "there is no genuine issue of material fact and that [it] is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Accordingly, the moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden. *Celotex v. Catrett,* 477 U.S. 317, 327 (1986). The moving party "need not negate the elements of the nonmovants's case." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994).

Once the moving party has carried its summary judgment burden, the opposing party must set forth specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); *Wallace v. Texas Tech Univ.,* 80 F.3d 1042 (5th Cir. 1996). Allegations or affidavits setting forth merely conclusory facts and

conclusions of law are insufficient. *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). Rather, the nonmovant is required to show more than some metaphysical doubt as to the material facts; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-86 (1986), he or she must put forth "concrete and particular facts." *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995).

LAW

Section 2612(a)(1)(D) of the FMLA requires employers governed thereunder to provide eligible employees with up to twelve weeks unpaid leave if an employee has a "serious health condition," rendering that employee unable to perform the functions of his or her normal position. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 761 (5th Cir. 1995). Once the employee returns from a qualified FMLA absence, the employer must return the employee to the same position or one comparable to that held before taking leave. 29 U.S.C. § 2612(a)(1); *see also Chaffin v. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999) (counseling that an employer may not "interfere with, restrain, or deny the exercise of . . . any right provided under" FMLA) (quoting from 29 U.S.C. § 2615(a)(2)). Thus, FMLA employers are statutorily prescribed from penalizing employees for exercising rights provided under the statute. 29 U.S.C. § 2612(a)(1); *Chaffin*, 179 F.3d at 319.

A plaintiff seeking to establish a claim of discrimination or retaliation pursuant to 42 U.S.C. § 12102(2) of the ADA must first establish that she has a "disability" by establishing that she has: (1) a physical or mental impairment that substantially limits one or more of the

major life activities of an individual; (2) a record of her impairment; or (3) that she can "be regarded" as having an impairment. *See Sharod v. American Airlines*, 132 F.3d 1112, 1119 (5th Cir. 1998). Thus, a plaintiff who is in fact not disabled, as is Dutton, may establish a claim of discrimination or retaliation under the "regarded as" prong if: (1) she has no impairment at all but is regarded by the employer as having a "substantially limiting" impairment; or (2) she has an impairment which is not substantially limiting but which the employer perceives as constituting a "substantially limiting" impairment. *See Peagram v. Honeywell, Inc.*, 363 F.3d 272, 287 (5th Cir. 2004). If a plaintiff can meet this burden, her claim is then assessed under the *McDonnell Douglas* standard for discrimination or retaliation claims discussed below. *Sharod*, 132 F.3d at 1122.

To prevail on a claim that one's employer retaliated against her for exercising FMLA rights in a case with no direct evidence of retaliation, as in this case, a plaintiff must first establish a prima facie case of retaliation. *Id.* at 320-21. This court utilizes the familiar *McDonnell Douglas* burden shifting analysis to determine whether the plaintiff was retaliated against. *Id.*; *see also Hunt v. Rapides Healthcare System, L.L.C.*, 277 F.3d 757, 768 (5th Cir. 2001). Therefore, a prima facie case of retaliation is demonstrated if the plaintiff establishes that: (1) she engaged in activity protected under the FMLA; (2) her employer carried out conduct adverse to her employment; (3) and a causal connection exists between the protected activity taken and the adverse employment action conducted by her employer. *Hunt*, 277 F.3d at 757; *Chaffin*, 179 F.3d at 319; *see also Jaynes v. Pennzoil Co.*, 207 F.3d 296, 299 (5th Cir. 2000). "The causal link required by the

third prong of the prima facie case does not rise to the level of a 'but for' standard. [Thus,] [t]he plaintiff 'need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element of a prima facie case.'" *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002) (internal and external citations omitted). Notwithstanding, the plaintiff carries the burden of persuasion, and once a prima facie case is established, a presumption of retaliation arises. *See, e.g., Pratt*, 247 F.3d at 606.

After the presumption is raised, however, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for terminating the employee. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Chaffin*, 179 F.3d at 319-20. As this burden "is one of production, not persuasion, it can involve no credibility assessment." *Reeves*, 530 U.S. at 142; *see also, Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004) (stating that "the employer need not prove that it was actually motivated by its proffered reason.") (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)). If the employer meets its burden, however, the presumption of retaliation is rebutted. *Chaffin*, 179 F.3d at 320. The burden of persuasion then shifts back to the plaintiff to demonstrate that her employer's articulated reason for terminating her was merely a pretext for unlawful retaliation. *Id.*

A plaintiff seeking to survive summary judgment at this juncture must point to some evidence establishing that the employer's proffered reasons are pretextual. *Reeves*, 530 U.S. at 143; *Gee*, 289 F.3d at 345. In some instances, proof of pretext alone will be sufficient to preclude summary judgment. *Reeves*, 530 U.S. at 143 (stating that "a plaintiff's prima facie case, combined with

sufficient evidence to find that the employer's asserted justification is false, *may permit* the trier of fact to conclude that the employer unlawfully discriminated") (emphasis supplied); *cf. Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 903 (5th Cir. 2000) (observing that it is "possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination"); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 371 (5th Cir. 1997). Indeed, the Supreme Court has instructed that, "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was *discriminatory*." *Reeves*, 530 U.S. at 143 (emphasis supplied). *Reeves* suggests that whether a plaintiff can survive summary judgment must be decided on a case-by-case analysis, determinative of a number of factors, including, "the strength of the prima facie case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the employer's case and that properly may be considered." *Id.* at 148-49. The ultimate burden of persuasion lies "at all times with the plaintiff." *Id.* at 143.

DISCUSSION

A. FMLA Claim

Dutton contends that she has propounded sufficient evidence to raise a genuine issue of material fact that Tulane terminated her because she took protected medical

leave.[2] For this reason, she maintains that the district erred in granting Tulane's motion for summary judgment.

For the purpose of our analysis we assume (as did the district court) without deciding that Dutton established a prima facie case of discrimination. We proceed to examine Tulane's asserted reasons for terminating Dutton. Tulane proffers as its legitimate, non-retaliatory reasons for terminating Dutton, assertions that Dutton had poor work

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[2] For the same reasons given by the district court, we reject Dutton's contention that she was retaliated against by not being restored to the same or an equivalent position held prior to her FMLA leave. Indeed, Dutton's own deposition testimony contravenes her assertion:

> Q. As part of that reorganization, you lost supervision over the billers and just had supervision over the collectors; is that right?
>
> A. Correct.
>
> Q. Does that decision form any part of this lawsuit?
>
> A. No. (Dutton's depo., at 55)
>
> . . . .
>
> Q. Other than your discharge from employment, were there any other incidents of retaliation that you can point to?
>
> A. Not that I can point to.

We also reject Dutton's contention that she was retaliated against because Tulane issued her a letter of reprimand after her return from leave. As the district court properly noted, merely being written up by one's employer is not an adverse employment action because such conduct does not involve an employer's "ultimate decision." *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (observing that ultimate acts involve " 'conduct such as hiring, granting leave, discharging, promoting, and compensating' ") (citation omitted); *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 394 n.2 (5th Cir. 2000) (holding that "receiving formal discipline" is not an "ultimate employment decision"). For this reason, we only consider Dutton's claim that she was unlawfully terminated for exercising her FMLA rights.

performances and failed to meet expectations in, among other areas, monitoring activities and accuracy of her work assignments. In support, Tulane proffers evidence that before, during, and after taking leave, Dutton exhibited repeated problems in her supervisory duties. Tulane provides evidence that as of December 6, 2000, Dutton had not instituted a procedure for her, or her staff, to collect stent invoices, and as a result, Tulane was not reimbursed for some of those expenditures;[3] that in May 2001, problems were discovered from an internal audit regarding Dutton's performance with follow-ups in collections; that in January 2002, Failla documented other problems with Dutton's performances, specifically with regard to: "(1) Dutton's use of her productivity reports, (2) her inadequate interaction bi-weekly with collectors [, i.e., her staff], (3) her practice of putting herself up above her collectors, (4) her failure to work enough hours, and (5) her absence from the department when her collectors were working."[4] Tulane also points to evidence demonstrating that in April 2001, approximately two months prior to Dutton's first leave, Dutton received a poor performance evaluation, and that it was Dutton's lowest overall score during her employment at Tulane. As a result of the low performance score, Dutton's supervisor, Faillia, suggested, *inter alia*, that Dutton work on her communications skills with her

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[3] Stents are cardiac implant devices used during surgery. One of Dutton's responsibilities included collecting information regarding stents placed in patients, e.g., the manufacturer's invoice number of the stent, from the patient's cardiologist in order for Tulane to be reimbursed by that patient's insurer for the cost of the stent.

[4] Dutton states in her deposition that she recalls discussing some of these issues with Failla, specifically with regard to the productivity of her collectors.

staff. Finally, Tulane highlights the list of serious deficiencies discovered by the ARS employees delineated, *supra*. We find that these reasons, if accepted as true by a factfinder, are sufficient to rebut Dutton's presumption of retaliation. Stated differently, the record evidence is sufficient to find that Tulane's proffered reasons are not incredible as a basis for its decision to terminate Dutton.

Thus, the question becomes whether Dutton has proffered substantial probative evidence that Tulane's reasons for discharging her were false. This tasks [sic] entails discerning whether the evidence propounded by Dutton is sufficient for a reasonable factfinder to conclude that Tulane's proffered reasons for discharging Dutton are mendacious. *See Laxton v. Gap, Inc.*, 333 F.3d 572, 579 (5th Cir. 2003).

In support of Dutton's contention that she was discharged because she took FMLA leave, Dutton asserts a host of arguments. Dutton first contends that, but for taking leave, Tulane would not have fired her. She asserts that the real reason she was terminated is because her file tracks had ballooned from 100 to over 1,000, while she was on leave. She also states that the increase was a natural result of her being out on medical leave, and suggests that the responsibility of attending to her accounts while on leave was left to Failla.

Dutton next contends that contrary to Tulane's contentions, her performance score of two on the formal performance evaluation does not reflect that she was deficient, but instead demonstrates that her performance consistently met expectations, but did not exceed expectations. She suggests that a reasonable factfinder could infer from the typewritten note listing her alleged infractions

that Failla presented to her is not credible because the listed discrepancies were not presented in her formal evaluation. She also states that Failla's enumerated discrepancies were typewritten on an informal document instead of the formal document required under Tulane's policy. Dutton further contends that a factfinder could infer that Failla is not credible because the comments written by Failla on her formal evaluation were identical to comments Failla wrote on the evaluations of five of her supervisory counterparts in different departments.

Next, Dutton contends that the informal typewritten complaints of her performance are contradicted by the findings that ensued from the internal audit. Dutton states that the audit's report conversely indicates that she was outperforming her supervisory counterparts working in the governmental section of the BSO. Dutton contends that the audit's report is further proof that the list of discrepancies presented to her by Failla is not credible since Failla's allegations are directly contradicted by the findings in the audit.

Finally, Dutton contends that she has established a genuine issue of material fact as to Failla's informal list of discrepancies because, after she was presented with the list from Failla, she filed a response rebutting every infraction alleged by her supervisor.

Based on the foregoing, the district court concluded that Dutton presented sufficient evidence to raise a genuine issue of material fact regarding whether Tulane's reasons for terminating Dutton were untrue. The court nonetheless concluded that Dutton failed to present competent summary judgment evidence sufficient to create a reasonable inference that Tulane fired her because she

exercised her rights under FMLA. We agree with both of the court's assessments.

As the district court noted, Dutton puts forth competing contentious assertions concerning whether she indeed had poor work performances and continually failed to meet Failla's work expectations. *But see Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991) (stating that "[t]he existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification"). Dutton's problem, however, is a failure of proof. Thus, Tulane's summary judgment results from Dutton's failure to meet the summary judgment standard. *See Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997) (directing that "[unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment"). Dutton's rebuttal lies in naked assertions, unsubstantiated by the record. Hence, she does not marshal sufficient objective evidence to allow for a reasonable inference that Tulane was motivated by retaliation. For example, she produces no counter-reports, aside from her self-serving written denial of the ARS employees' findings, to rebut Tulane's third-party's report listing a host of workplace failures by her. She produces no affidavits or deposition testimony from other supervisors or credible employees attesting to the fact that the ARS employee's report was inaccurate or false. There is no actual proof that Failla was indeed responsible for her accounts while she was out on leave, and no proof to sufficiently rebut

Tulane's assertion that she neglected to open weeks worth of incoming mail.

Oddly, Dutton's inability to rebut her employer's proffered business reasons for terminating her is further hindered by her own deposition testimony. Indeed, plaintiff's deposition testimony acts to suck the remaining air propelling her claim, completely out of her sails. We highlight just some of her deposition testimony to make our point:

> Q. Were you receptive to their [the ARS employees] efforts to help out?
>
> A. **I became receptive, yes.** (Dutton's depo., at 85);
>
> Q. Okay. Item 2 [of the ARS report] mentions a productivity report. . . .
>
> . . . .
>
> Q. Do you recall her [Failla] saying anything that indicated to you a concern on Mary's part that the collectors could have been more productive than they actually were?
>
> A. **Yes.** (Dutton's depo., at 100-02);
>
> Q. Were you aware that an internal audit had occurred before I produced this document to you in the lawsuit?
>
> A. **Yes.**
>
> . . . .
>
> Q. It [the internal audit report] says, "Collection follow-up should be monitored more closely to help ensure adequate follow-up is

performed timely based on established collection philosophies." Do you see that?

A. Yes.

Q. Prior to getting a copy of this document from me, were you aware that the internal auditors found collection follow-up to be a major issue as part of their audit?

A. Yes. (Dutton's depo., at 102-03);

Q. What I'm asking is: Part of what needed to be done to improve the follow-up would have been to communicate your expectations to your collectors, but part of that, also, was you actually, effectively, monitoring their activities; is that right?

A. Right. (Dutton's depo., at 102-03)

We think some of the most damning testimony has to do with statements of how Dutton rated her own performance in a particular area:

Q. Take a look at item 5 [of the formal evaluation], 'Monitors activities and work assignments for accuracy, timeliness, in compliance with department standards.' Do you see that?

A. Yes.

Q. Okay. Now, you rated yourself a one, 'Does not meet [expectations]'; is that right?

A. Yes. (Dutton's depo., at 108)

After careful review of the entire record, we are sufficiently persuaded that Dutton has failed to provide evidence sufficient for a reasonable factfinder to infer, by a

preponderance of the evidence, that Tulane discharged her – because she exercised her rights under the FMLA.

B. ADA Claim

We pretermit an analysis of the timeliness of Dutton's ADA claim and proceed to the merits and conclude as the district court that she failed to establish a "disability" under the Americans With Disability Act. The only element that was at issue in establishing that she had a disability was the "regarded as" prong. *See Sharod,* 132 F.3d at 1122. The district court concluded that Dutton produced no evidence to raise a genuine issue of material fact that she was ever "regarded as" disabled by Tulane. We have carefully reviewed this record and similarly find that there is no evidence to create a genuine issue of material fact that Tulane ever regarded Dutton as disabled. Accordingly, this claim is without merit.

C. Attorney's Fees

Finally, Tulane contends, pursuant to Fifth Circuit Rule 47.8, that it is entitled to an award of a portion of the attorney's fees it incurred in defending Dutton's claims under the ADA and the FMLA because Dutton's claims were frivolous. After dismissing all of Dutton's claims with prejudice, the district court awarded Tulane $21,787.50 in attorney's fees it incurred in defending Dutton's claims under the ADA. Section 12205 of Title 42 of the United States Code allows a court to award the defending party of an ADA action, "reasonable attorney's fees, including litigation expenses and costs," if the court finds the plaintiff's claim was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad

faith." *Christiansburg Garment Co. V. EEOC,* 434 U.S. 412, 421 (1978). *See also EEOC v. First Alabama Bank, N.A.,* 595 F.2d 1050, 1056 (5th Cir. 1979). The district court noted that Dutton failed to dismiss the claim after Tulane suggested to her it had no merit. We have reviewed Dutton's contentions in her brief suggesting that her ADA claim had merit because Tulane offered to settle that claim. Again, Dutton's own deposition testimony cited above acts as her Achilles heel.

Because Dutton virtually admits she had no ADA claim, we do not consider the district court's denial of her request for equitable tolling. After full review of the record, we cannot find that the district court abused its discretion in awarding Tulane attorney's fees pursuant to § 12205 of the ADA. *See No Barriers, Inc. v. Brinker Chili's Tx., Inc.,* 262 F.3d 496, 498 (5th Cir. 2001) (directing that this court reviews a district court's award of attorney's fees for an abuse of discretion). Accordingly, the district court's award of attorney's fees to Tulane in the amount of $21,787.50 was not an abuse of discretion. Also, carried with the case is Tulane's motion for additional attorney's fees in the amount of $12,443.12. We award $10,000 as reasonable attorney's fees for this appeal. Costs are assessed against the appellant, Dutton.

CONCLUSION

Because Dutton does not present sufficient evidence to allow for a reasonable inference that Tulane terminated her because she took protected medical leave, she has failed to meet her summary judgment burden of proving a genuine issue of material fact concerning her FMLA claim. For this reason, and all the reasons stated herein, the

order of summary judgment by the district court dismissing Dutton's claims with prejudice and awarding Tulane attorney's fees is AFFIRMED. Tulane's motion for additional attorney's fees is GRANTED.

SUMMARY JUDGMENT AND ATTORNEY'S FEE AWARD AFFIRMED AND MOTION FOR ADDITIONAL ATTORNEY'S FEES GRANTED IN PART.

MINUTE ENTRY
McNAMARA, J.
MAY 12, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AMANDA DUTTON	*	CIVIL ACTION
	*	
VERSUS	*	NO: 03-2084
	*	
UNIVERSITY HEALTHCARE SYSTEM, L.L.C., ET AL	*	SECTION: "D"(4)
	*	

(Filed May 12, 2004)

Before the court are the following motions:

(1) **"Motion to Strike Expert Witnesses"** (Doc. No. 27) filed by Defendant, University Healthcare System, L.L.C. d/b/a Tulane University Hospital and Clinic (Tulane Hospital); and

(2) **"Motion to Strike Witnesses and Exhibits"** (Doc. No. 40) filed by Defendant.

The motions are before the court on briefs, without oral argument. Now, having reviewed the memoranda of counsel and the applicable law, the court rules.

(1) Defendant's 1st Motion to Strike (Doc. No. 27)

In this motion, Defendant asks the court to strike the following three witnesses designated as experts by the Plaintiff: (1) Dr. Craig R. Thompson; (2) Dr. Robert W. Kelly; and (3) Dr. Laura E. Trunk. Defendant argues that these three physicians "appear to be Dutton's present or former treating physicians" and that the reports they have

provided do not satisfy the requirements of Federal Rule of Civil Procedure 26(a)(2)(B), because these physicians have "either simply read their charts regarding Dutton or read the records of others." (*See* Defendant's Motion, Doc. No. 27 at 1; *see also* Doc. No. 47, to which Defendant has attached the reports of Drs. Thompson, Kelly and Trunk).

Alternatively, Defendant asks the court for an "order limiting these witness' testimony to the facts of their treatment of plaintiff and prohibiting them from testifying regarding issues of causation or prognosis with respect to Dutton's alleged conditions." (Doc. No. 27 at 3).

The court **GRANTS** Defendant's 1st Motion to Strike, **STRIKING** Drs. Thompson, Kelly and Trunk as "experts" because they have failed to provide proper expert reports. However, if this matter had gone to Trial, they would be allowed to testify regarding their treatment of Plaintiff.[1]

(2) Defendant's 2nd Motion to Strike (Doc. No. 40)

In this motion, Defendant moves the court for an order striking the following witnesses and exhibit from Plaintiff's Amended Witness and Exhibit List (Doc. No. 32):

(1) Dr. Bellina (Plaintiff's treating physician);

(2) Rose Kline (former admitting supervisor); and

(3) Department of Labor FOIA documents.

[1] In a Minute Entry issued simultaneously with this one, the court granted the Defendant's Motion for Summary Judgment, dismissing Plaintiff's claims. (Doc. No. 63).

Additionally, Defendant moves the court for an order striking the following exhibits from Plaintiffs' Opposition (Doc. No. 33) to Defendant's Motion for Summary Judgment:

(1) Expert Report of Dr. Thompson (Plaintiff's Exhibit 23);

(2) Expert Reports of Drs. Trunk and Kelly (Plaintiff's Exhibits 21 and 22);

(3) the DOL Investigative Report (Plaintiff's Exhibit 62); and

(3) [sic] the Affidavits of Amanda Dutton, Karen Erin and Rose Kline (Plaintiff's Exhibits 63-65).

Background

In the court's Minute Entry entered following the Preliminary Conference, the court instructs the parties, in part, as follows:

> Initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1) must be exchanged no later than November 6, 2003.
>
> Depositions for use at trial shall be taken and all discovery shall be completed no later than April 5, 2004.
>
> Written reports of experts, including treating physicians, who may be witnesses for plaintiff fully setting forth all matters about which they will testify and the basis therefor shall be obtained and delivered to counsel for defendant as soon as possible, but in no event later than February 3, 2004.

> Written reports of experts, including treating physicians, who may be witnesses for defendant fully setting forth all matters about which they will testify and the basis therefor shall be obtained and delivered to counsel for plaintiff as soon as possible, but in no event later than March 4, 2004.
>
> Counsel for the parties shall file in the record and serve upon their opponents a list of **all witnesses** who may or will be called to testify at trial, and **all exhibits** that may or will be used at trial no later than **March 4, 2004**.
>
> The Court will **not permit any witness, expert or fact, to testify or any exhibits** to be used unless there has been compliance with this Minute Entry as it pertains to the witness and/or exhibits, **without an order to do so issued on motion for good cause.**

(*See* Minute Entry, entered on October 23, 2003, Doc. No. 4) (emphasis added).

On January 30, 2004, Defendant filed an "Unopposed Motion to Extend the Deadline to Exchange Expert Reports and to Depose Experts". The court granted that motion, and Plaintiff's deadline to provide expert reports was extended to March 19, 2004, and Defendant's deadline to provide expert reports was extended to April 19, 2004, with both parties reserving their rights to depose said experts prior to trial. (Doc. No. 7).

On March 3, 2004, Plaintiff timely filed her Witness and Exhibit List. (Doc. No. 9). On March 4, 2004, Defendant timely filed its Exhibit List (Doc. No. 10) and Witness List (Doc. No. 11).

On March 30, 2004, Defendant filed its Motion for Summary Judgment (Doc. No. 25) and 1st Motion to Strike (Doc. No. 27). On April 6, 2004, over a month after the court deadline of March 4, 2004, Plaintiff filed an "Amended Witness and Exhibit List". (Doc. No. 32). And, on April 12, 2004, Plaintiff filed her opposition (Doc. No. 33) to Defendant's Motion for Summary Judgment.

Dr. Bellina

On Plaintiff's original Witness List, Plaintiff includes **"Dr. Bellina: Treating Physician."** Defendant argues that Dr. Bellina should be stricken because Plaintiff never provided Defendant with an expert report by Dr. Bellina. Plaintiff submits that due to a medical inability, Dr. Bellina did not provide an expert report, and that Dr. Kelly (Dr. Bellina's assistant) summarized Dr. Bellina's notes. The court concludes that Dr. Bellina should be stricken as an expert, because he has provided no expert report.

Accordingly, the court **STRIKES "Dr. Bellina"** as an expert in this matter.

Rose Kline

On Plaintiff's "Amended Witness and Exhibit List," Plaintiff added **"Rose Kline"** as an additional witness. Because depositions had to be taken and discovery had to be completed by April 5, 2004 (the day before Plaintiff filed Amended Witness and Exhibit List), Tulane was not afforded the opportunity to depose this witness. Counsel for Plaintiff argues that she informed Defendant's counsel of her "intention" to amend her witness list to add Rose

Kline during the deposition of another witness, Mary Failla, on March 24, 2004, and thus Defendant had two weeks to depose Rose Kline. (Plaintiff's Opp., Doc. No. 56, p. 2). However, the court rejects this argument, because this is a court of record, not "intention", and based on the record, Plaintiff's amended witness list was untimely filed without a motion for good cause.

Accordingly, the court **STRIKES "Rose Kline"** from Plaintiff's Amended Witness List.

The court also **STRIKES** the **Affidavit of Rose Kline** which Plaintiff attached as **Exhibit 65**, to her opposition to Defendant's Motion for Summary Judgment. Plaintiff filed her opposition (Doc. No. 33) on **April 12, 2004**, and the court will not allow Plaintiff to get testimony from this witness through the back door when she is precluded from getting it in the front door.

Department of Labor Investigative Report

On Plaintiff's "Amended Witness and Exhibit List", Plaintiff also added **"Department of Labor FOIA documents"** as a new exhibit. However, contrary to the court's Scheduling Order, Plaintiff did not file a motion for good cause to add this exhibit past the court-imposed deadline. In her opposition, Plaintiff argues that Defendant had notice of Plaintiff's "intention" to use the DOL's investigative report, because Plaintiff's November 19, 2003 Amend (*sic*) Initial Disclosures lists "All documents received pursuant to a FOIA request from the Department of Labor". (Plaintiff's Opp., Doc. No. 56, p. 1). However, again, the court rejects this argument because this is a court of record, not "intention", and based on the record, Plaintiff's amended exhibit list was untimely filed without

a motion for good cause. Further, Plaintiff's Initial Disclosure does not satisfy Plaintiff's obligation to timely file her exhibit list.

Accordingly, the court **STRIKES** the **"Department of Labor FOIA documents"** from Plaintiff's Amended Exhibit List.

The court also **STRIKES** the **Department of Labor internal narrative report** which Plaintiff attached as **Exhibit 62**, to her opposition to Defendant's Motion for Summary Judgment. Plaintiff filed her opposition (Doc. No. 33) on **April 12, 2004**, and the court will not allow Plaintiff to get this document in the back door when she is precluded from getting it in the front door.

Reports of Drs. Trunk, Kelly and Thompson

In opposition to Defendant's Motion for Summary Judgment, Plaintiff attaches the "reports" of Drs. Trunk, Kelly and Thompson. (Plaintiff's Exhibits 21, 22, and 23). However, in the format submitted by Plaintiff, the court finds that such "reports" are incompetent summary judgment evidence and accordingly **STRIKES** them as Exhibits to Plaintiff's Opposition.

The Affidavits of Plaintiff and Karen Erin

In opposition to Defendant's Motion for Summary Judgment, Plaintiff attaches the Affidavit of Plaintiff and Affidavit of Karen Erin.[3] (Plaintiff's Exhibits 63 and 64).

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[3] Unlike Rose Kline, Karen Erin was included on Plaintiff's timely filed "original" Witness List. (Doc. No. 9).

Defendant argues that these Affidavits should be stricken because they contain inadmissible hearsay. The court **DENIES** Defendant's Motion to Strike these Affidavits, but discusses the weight given to these Affidavits in the court's ruling on Defendant's Motion for Summary Judgment.

/s/ A.J. McNamara

* * *

MINUTE ENTRY
McNAMARA, J.
MAY 12, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AMANDA DUTTON	*	CIVIL ACTION
	*	
VERSUS	*	NO: 03-2084
	*	
UNIVERSITY HEALTHCARE SYSTEM, L.L.C., ET AL	*	SECTION: "D"(4)
	*	

(Filed May 12, 2004)

Before the court are the following motions:

(1) **"Motion for Summary Judgment"** filed by Defendant, University Healthcare System, L.L.C. d/b/a Tulane University Hospital and Clinic (Tulane Hospital); and

(2) **"Cross-Motion for Summary Judgment"** filed by Plaintiff, Amanda Dutton.[1]

The motions are before the court on briefs, without oral argument. Now, having reviewed the memoranda of counsel, the record and the applicable law, the court finds that there are no genuine issues of material fact, and Defendant is entitled to judgment as a matter of law.

[1] Plaintiff's Cross-Motion for Summary Judgment is also her opposition to Defendant's Motion for Summary Judgment.

I. Background

Plaintiff, Amanda Dutton, was employed by Tulane Hospital from March 1999, through December 4, 2001, when she was terminated. Plaintiff first held the position of Supervisor of non-governmental billing and non-governmental collections,[2] and reported to the then Director of Business Services, Mike Lane.

In June 2000, the Tulane Hospital billing and collection department was re-organized, and Mary Failla replaced Mike Lane as the business office director.[3] Plaintiff lost supervision over the non-governmental billing, but kept supervision over the non-governmental collection. Plaintiff's duties included, but were not limited to, following-up and working with the collectors to insure they were collecting money owed to Tulane Hospital in an appropriate manner.

To assist and educate personnel in the business office, Ms. Failla hired an outside consulting firm, Coast to Coast Consulting, Inc. (C2C). Two trainers from C2C worked with Plaintiff and her collection staff from approximately October 2000, until mid-December 2000.

Despite the attempt to improve Plaintiff's performance, Ms. Failla observed and documented problems. On

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[2] In her opposition memorandum, Plaintiff states that "[t]he governmental collections department collected from governmental entities such as Medicare, Medicaid and Champus" while "[t]he non-governmental department collected from private insurance payers and workmen's compensation." (Plaintiff's Opp. at 2).

[3] Before her employment at Tulane, Mary Failla had worked as the business office manager at Lakeside Hospital, which (like Tulane) is an HCA facility.

November 6, 2000, Ms. Failla sent Plaintiff an e-mail telling her "not to pass the buck." (Defendant's Exhibit F). As of December 6, 2000, Plaintiff had not instituted a written procedure in place for gathering stent invoices so that Tulane could collect them [sic] the insurance companies. (Plaintiff's Dep. at 92). And she never finalized a stent invoice collection procedure during her tenure at Tulane. (*Id.* at 94).

While Plaintiff does not recall the actual date, she admits that Ms. Failla discussed with her productivity reports and Ms. Failla's concern that Plaintiff's collectors could have been more productive than they actually were. (*Id.* at 101-02).

In April 2001, Plaintiff received a performance evaluation, with an overall performance score of two. (Defendant's Exhibit I). This was the lowest overall performance score that Dutton received while employed at Tulane Hospital, and it was also the lowest performance score of any of the supervisors who reported to Ms. Failla. (Plaintiff's Dep. at 107, and Failla's Dep. at 178). Ms. Failla explained that such a performance was "barely satisfactory." (Failla's Dep. at 178). Plaintiff even rated herself as "does not meet" expectation in the area of "monitor[ing] activities and work assignments for accuracy, timeliness and compliance with department standards." (Defendant's Exhibit I, p. 5).

On May 7, 2001, financial analysts from Tulane Hospital's corporate office issued an audit report and review of Tulane Hospital's Business Services Offices. (Defendant's Exhibit J). In their report, these analysts described as a "major issue": "[C]ollection follow-up should be monitored more closely to help ensure adequate follow-up is performed adequately, based on established collection philosophies." (Exhibit J, p. 2).

Plaintiff admitted that she was aware that the internal auditors found collection follow-up to be a major issue as part of the audit, and she agreed that communication, follow-up and monitoring of her collectors needed improvement. (Plaintiff's Dep. at 103). Plaintiff also admitted that she could monitor her collectors' activities by using a computer system called "File Tracks",[4] and she could also monitor their telephone calls by reviewing their telephone logs. (*Id.* at 106).

From June 20, 2001 through August 20, 2001, Plaintiff requested and was granted leave under the Federal Medical Leave Act, for the removal of a fibroid tumor in her uterus. (*See* Defendant's Exhibit K, Leave of Absence Report). While Plaintiff was on this leave, Tulane Hospital contracted with Advanced Receivables Strategy, Inc. (ARS), a company that specialized in billing and collection functions.

Two ARS representatives, Elizabeth Mirck and Carlo Ianni, performed many of Plaintiff's duties during her absence. On July 19, 2001, Ms. Mirck e-mailed Ms. Failla regarding the following issues she encountered during her three weeks as Interim Collections manager: (1) there was no evidence that the collectors' productivity logs were reviewed for accuracy, accountability or for use as a training and counseling tool and the manager's file track

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[4] In her opposition memorandum, Plaintiff explained that:

> The file track is the system used by each collector to receive and work accounts for collections each day. At the end of each day, Defendant's system downloads new collection accounts into each collector's file tracks. [Plaintiff] receives accounts from each collector that has not collected an account over 30 days old. [Plaintiff's] file track is updated nightly as well.

(Plaintiff's Opp. at 3, citations omitted).

did not show any interaction with the collector after review and replacement back to the specific collector; (2) collector phone usage was not monitored; (3) implant invoices were not requested timely; (4) cardiac stent invoicing procedures were not developed or implemented to consistently facilitate the collectors ability to file for payment; (5) lines of communication and interaction between the supervisor (Plaintiff) and her staff appeared to be almost non-existent or limited; (6) Plaintiff's inbox contained correspondence that required immediate attention; (7) there was no organized filing system in place for confidential personnel information; (8) "generally everything was unorganized"; (9) the failure to implement and monitor certain procedures was creating redundant work for two departments. (Defendant's Exhibit L, Mirck E-mail).

On August 13, 2001, Mr. Ianni (the other ARS representative) e-mailed Ms Failla regarding problems that he discovered: (1) Plaintiff's staff members were not aware of proper policy procedures for non-covered facility charges; (2) the staff members were improperly or poorly documenting accounts; (3) follow-up was not monitored for appropriateness and timeliness; (4) ceratin [sic] collection staff members did not understand why they were performing certain tasks. (Defendant's Exhibit L, Ianni E-mail).

In a written warning dated August 20, 2001, Ms. Failla listed Plaintiff's "Violations and Area[s] of Deficiency", with an accompanying list of "Corrective Action[s]". (Defendant's Exhibit N, Employee Corrective Counseling Performance Plan & Attachments).

Ms. Failla's listed violations/areas of deficiency mirrored the deficiencies that had been discovered by the ARS

personnel, Ms. Mirck and Mr. Ianni, and they included: (1) lines of communication to the staff were almost non-existent regarding procedure implementations: (2) mail received was found unopened and had never been worked; (3) phone logs were not properly used; (4) staff was not trained appropriately; (5) staff follow-up efforts to collect were not monitored appropriately; (6) staff notes that were entered into the system were poor and incomplete; (7) staff had lack of training, guidance and counseling; (8) cardiac stent procedure was never completed and set up; (9) no organization fo [sic] the office or file cabinet; (10) work given to Plaintiff to complete was never done and never turned in as requested; (11) file track was not completed timely or documented properly. (*Id.*).

On August 21, 2001, the day Plaintiff returned from her medical leave, Ms. Failla counseled Plaintiff and presented her with a copy of the Areas of Deficiency and Corrective Action plan. (Plaintiff's Dep. at 119-20).[5] On August 29, 2001, Plaintiff responded with a memorandum in which Plaintiff denied most of the issues raised by Ms. Failla. (Defendant's Exhibit O, Plaintiff's Memo.; *see also* Plaintiff's Dep. at 121). Thereafter, Ms. Failla and Plaintiff exchanged more memoranda. (Defendant's Exhibit P,

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[5] In her deposition, Plaintiff admits that she was counseled on August 21, 2001, and she received a list of "Violations/Areas of Deficiency" and "Corrective Action". (Plaintiff's Dep. at 119-20).

In her Affidavit attached to her Opposition to Defendant's Motion for Summary Judgment, Plaintiff denies receiving the Corrective Action portion of the warning and write-up. (Plaintiff's Exhibit 65, ¶ 6). However, Plaintiff cannot defeat Defendant's motion for summary judgment using an affidavit that impeaches her prior deposition. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 496-96 (5th Cir. 1996).

Failla's memo; and Defendant's Exhibits Q & R, Plaintiff's memo's).

In October 2001, Plaintiff requested time off to undergo an additional medical procedure, but she did not submit a leave of absence form. Neither Plaintiff nor Tulane Hospital designated this absence as Family Medical Leave. However, Plaintiff was permitted to be absent from work. Plaintiff was absent from October 15, 2001 to October 22, 2001, during which time, she underwent a single day of out-patient diagnostic procedures (which included an endoscopy and colonoscopy). (Dutton Dep. at 214).

On November 1, 2001, Ms. Failla reviewed Plaintiff's "File Tracks", the computer system used by the Tulane Hospital Business office to track patient billing and payment cycles.[4] Ms. Failla noted that Plaintiff had over 1,000 accounts that were not being worked in her File Tracks system, and she asked Plaintiff to clean out her File Tracks by November 9, 2001. (Defendant's Exhibit S, Failla's E-mail dated November 1, 2001).

On November 9, 2001, Ms. Failla reviewed Plaintiff's File Tracks and found that there were still over 1,000 accounts in the system that needed work. (Defendant's Exhibit T, Failla's E-mail dated November 9, 2001; Defendant's Exhibit U, print-out of Plaintiff's file track accounts). The dollar value of these unworked accounts was $556,732.04. (Defendant's Exhibit U).

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[4] *See also* fn. 4, *supra*, for Plaintiff's explanation of the file track system.

On December 4, 2001, Ms. Failla and Human Resources specialist, Lisa Talbot, met with Plaintiff and terminated her for failing to meet expectations and poor performance. (Plaintiff's Dep. at 138; & Defendant's Exhibit W, Personnel Action Request). This decision to terminate Plaintiff was made after review and investigation by the Tulane Hospital Interim Chief Financial Officer (CFO), Brian Lee, and outside counsel. (Plaintiff's Exhibit 8, Lee's Dep. at 23-29).

On December 12, 2001, Plaintiff requested reconsideration of her discharge by writing CFO Lee. (Defendant's Exhibit X). In her letter to Mr. Lee, Plaintiff states in part that "[m]y immediate supervisor's reason for termination was personal in that she thought we were not getting along together . . . My main concern and evaluation is that this Director has been terminating existing employees and assigning positions to [employees at Lakeside Hospital where she previously worked]." (*Id.*). Plaintiff makes no specific mention of discrimination or retaliation.

On February 14, 2002, Mr. Lee wrote Plaintiff advising her that:

> I have received your Formal Letter of Grievance and attached documentation. Based upon the review of these documents and internal investigations, it has been determined that your termination was justified and will not be overturned.

(Defendant's Exhibit Y).

On February 18, 2002, Plaintiff wrote to Mr. Lee requesting additional review. (Defendant's Exhibit Z). On or about March 11, 2002, Plaintiff made a written appeal to Tulane's President and Chief Executive Officer, Jim Montgomery. (Plaintiff's Exhibit 45). On April 4, 2002, Mr.

Montgomery informed Plaintiff that he found no supportive evidence to overturn the decision to terminate her. (Defendant's Exhibit AA).

Following her termination, Plaintiff went to the Equal Employment Opportunity Commission (EEOC), spoke to someone there and filled out a questionnaire. But Plaintiff did not sign or file a charge with the EEOC, because after her interview with the EEOC representative, he told Plaintiff "he wasn't sure if there was anything they could do for [her]" and because Plaintiff "never heard anything from him," she understood that to mean that the EEOC could do "nothing" for her. (Dutton Dep. at 145-49).

Defendant concedes that Plaintiff subsequently filed a charge with the Department of Labor, and Defendant submits that "[a]fter a DOL associate investigator made a determination that an FMLA violation had occurred, the matter was submitted to the DOL management for review and nothing more was done by the DOL." (Defendant's Memo. at 12).[7]

On July 22, 2003, Plaintiff filed this lawsuit against Defendant, asserting claims under the **Americans with Disabilities Act (ADA)**, 42 U.S.C. § 12101 *et seq.*, the **Family Medical Leave Act (FMLA)**, 29 U.S.C. § 2601 *et seq.*, and unspecified laws of Louisiana. In her Complaint,

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[7] In her exhibits attached to her Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff has included a copy of the DOL investigative report. (Plaintiff's Exhibit 62). However, in another Minute Entry issued simultaneously with this Minute Entry, the court granted defendant's Motion to Strike this Exhibit as untimely listed as a Trial Exhibit. (*See* Minute Entry, Doc. No. 62; *see also* fn. 21, *infra*).

Plaintiff specifically claims that Defendant intentionally discriminated and retaliated against her by:

(1) refusing to restore Plaintiff to the same or equivalent position when she returned from her first FMLA leave in August 2001;

(2) discharging Plaintiff from her employment without just cause less than two months after returning from her second FMLA leave in October 2001 and due to Defendant's "perception" that Plaintiff suffered from a "disability" that would cause future absences.

(Complaint, ¶ 14).

In its Motion for Summary Judgment, Defendant seeks dismissal of all of Plaintiff's claims. In her Cross-Motion for Summary Judgment, Plaintiff seeks partial judgment on two elements of her FMLA claim, "namely whether Dutton's leaves are protected under the FMLA and whether Dutton suffered adverse action in proximity to returning to work from those leaves." (Plaintiff's Reply to Defendant's Opp. at 3).

I. Legal Analysis

A. Plaintiff's ADA Claim

(1) Plaintiff filed a charge with the EEOC and her ADA claim is now untimely.

"Under the ADA, a plaintiff must file a charge of discrimination [with the EEOC] within 300 days of the alleged discriminatory act." *Ramirez v. City of San Antonio*, 312 F.3d 178, 181 (5th Cir. 2002) *citing* 42 U.S.C. § 12117 (incorporating 42 U.S.C. § 2000e-5(e)). The limitations

period on an employment discrimination claim "begins to run from the time the complainant knows or reasonably should have known that the challenged act occurred." *Ramirez*, 312 F.3d at 181 (citation omitted).

The limitations period in this case began when Defendant terminated Plaintiff's employment on December 4, 2001. Plaintiff does not dispute that she did not file a charge with the EEOC. However, Plaintiff argues that the limitations for filing her EEOC charge should be tolled "because of the EEOC's inaction." (Plaintiff's Opp. at 30).

In her Opposition Memorandum, Plaintiff maintains that:

> she went to the EEOC and filled out a questionnaire form regarding her allegations within the 300 days of her termination. Once the form was completed, Dutton met with an EEOC investigator. The investigator informed Dutton there was nothing they could do because she did not have a disability and that [ ] the supervisor of the governmental collections division was also an African American female. *Dutton was not represented by legal counsel at the time and took the investigator's word.*

(Plaintiff's Opp. at 31, citing her Dep. at 145) (emphasis added).

However, in her deposition, Plaintiff admitted that *she did visit an attorney prior to going to the EEOC,* and he advised her to go to the EEOC as her first step. (Plaintiff's Dep. at 243). Further, in her deposition, Plaintiff testified that the EEOC representative did not "confirm" that the EEOC could not help her, but she since Plaintiff "never

heard from him, [she] took that to mean nothing." (*Id.* at 149).

Although the burden is on Plaintiff to demonstrate a factual basis to toll the limitations period, based on the little information Plaintiff provided in her deposition, the court "cannot say that the EEOC affirmatively misled [her] about the nature of [her] rights." *Ramirez*, 312 F.3d at 185. And to date, Plaintiff has not filed an EEOC charge. Thus, the court concludes that Plaintiff has failed to meet her burden of showing that equitable tolling applies in her case, and Defendant's motion for summary judgment should be granted on the ground that Plaintiff's ADA claim was untimely filed.

(2) Even if Plaintiff's ADA claim is properly before this court, it has no merit.

Under the ADA, the term "disability" means:

(1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A-C).

Here, Plaintiff's ADA claims falls under the "regarded as" category. An individual, like Plaintiff, who is not in fact disabled may have a viable claim that she was "regarded as" disabled if: (1) she has no impairment at all but is regarded by the employer as having a "substantially limiting" impairment; or (2) she has an impairment which

is not substantially limiting but which the employer perceives as constituting a "substantially limiting" impairment. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 287 (5th Cir. 2004).

To survive summary judgment, Plaintiff must show that Defendant regarded her impairment (whether imagined or real) as being "substantially limiting," i.e., foreclosing her ability to perform "a class of jobs or a broad range of jobs." *Id.* The inability to perform a single, particular job does not constitute a substantial limitation. *Id., see also Dupre v. Charter Behavioral Health Systems, Inc.*, 242 F.3d 610, 616 (5th Cir. 2001) (even if employer thought that employee's condition would cause her to be absent, there was no evidence that employer thought employee was unable to perform other jobs).

Here, the record shows no evidence upon which a reasonable trier of fact could conclude that Tulane Hospital regarded Plaintiff as disabled, because Plaintiff has presented no evidence that Tulane regarded her as having an actual or imagined impairment that substantially limited her ability to perform the particular job she had, much less work in a whole class or broad range of jobs. *Id.*

It is undisputed that Tulane Hospital knew that Plaintiff had taken leave for a gynecological procedure in June 2001, and that Plaintiff had a short work absence for another medical procedure in October 2001. In a letter written to Tulane in support of Plaintiff's June 2001 request for medical leave, Plaintiff's doctor stated that after some five weeks of recovery, Plaintiff would be able to return to work with no restrictions. (Defendant's Ex. K, Human Resources File, containing Dr. Bellina's letter dated June 13, 2001).

Further, in her deposition, Plaintiff admitted that: she had not been diagnosed with a disability while working for Tulane; she did not take a leave of absence in connection with any disability; she never requested an accommodation from Tulane in connection with a disability; and she never told anyone at Tulane that she had a disability. (Plaintiff's Dep. at 79-80).

Plaintiff has simply failed to create a genuine issue of fact as to whether Tulane terminated her because Tulane regarded her as having an impairment, much less, a substantially limiting one. Thus, Tulane is entitled to summary judgment dismissing Plaintiff's "regarded as" ADA claim.

B. Plaintiff's FMLA Claims

In her Complaint, Plaintiff asserts two retaliation claims under the FMLA:

> (1) Defendant refused to restore Plaintiff to the same or equivalent position upon her return from her first FMLA leave in August 2001; and
>
> (2) Defendant discharged Plaintiff from her employment without just cause less than two months after returning from her second FMLA leave in October 2001.

(Complaint at ¶ 14).

In *Chafin v. John H. Carter., Inc.*, 179 F.3d 316 (5th Cir. 1999), the Fifth Circuit summarized the rights of an employee under the FMLA and the corresponding obligations of an employer:

> The FMLA requires covered employers to provide up to 12 weeks of unpaid leave to any eligible

> employee who suffers from "a serious health condition that makes the employee unable to perform the functions of the position of such employee." After a qualifying absence, the employer must restore the employee to the same position or a position comparable to that held by the employee before the leave. An employer may not "interfere with, restrain, or deny the exercise of . . . any right provided under the FMLA. Thus, employers have a prescriptive obligation under the FMLA – they must grant employees substantive rights guaranteed by the FMLA – and they have a proscriptive obligation – they may not penalize employees for exercising these rights.

Id. at 319.

When direct evidence of discrimination is lacking, as is the case here, "the *McDonnell Douglas*[9] organizational framework applies to claims that an employee was penalized for exercising rights guaranteed by the FMLA." *Id.* The three-part burden-shifting scheme places the onus on the plaintiff alleging an adverse employment action to first establish a *prima facie* case of discrimination that:

> (1) she engaged in a protected activity;
>
> (2) the employer committed an adverse employment action (or retaliation) against her; and
>
> (3) there is a casual connection between the protected activity and the adverse employment action.

Id.

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[9] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the plaintiff makes this preliminary showing, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer carries this burden of production, the presumption raised by the *prima facie* case is rebutted. *Id.* at 319-20.

Once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000); *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 768 (5th Cir. 2001).

(1) Can Plaintiff satisfy the three prongs of a prima facie case under the FMLA? "No."

First Prong: *Did Plaintiff engage in protected activity? "Yes."*

For purposes of its motion for summary judgement, Tulane does not dispute that Plaintiff engaged in "protected activity" when: (1) Plaintiff took a designated FMLA leave from June 20, 2001 through August 20, 2001; and (2) took undesignated leave from work for a one-day outpatient procedure from Monday, October 15, 2001 through

Monday, October 22, 2001. (Defendant's Supporting Memo. at 19).[9]

Second Prong: *Did Plaintiff an adverse employment action? "Yes."*

Under Fifth Circuit jurisprudence, only "ultimate employment decisions" such as hiring, granting leave, discharging, promoting and compensating, satisfy the "adverse employment action" element of a *prima facie* case of retaliation. *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 769 (5th Cir. 2001). Here, it is undisputed that Plaintiff received an adverse employment action when she was terminated from her employment at Tulane on December 4, 2001.

In her Complaint, Plaintiff claims that she also suffered an adverse employment action, when she returned from her first FMLA leave on or about August 21, 2001, because Defendant refused to restore her to the

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[9] The court notes that in opposition to Plaintiff's cross-motion for summary judgment, Tulane argues that:

> Dutton's absence from work from October 15, 2001 through October 22, 2001 was not covered by the FMLA. Although Tulane Hospital allowed Dutton to be absent from work, Dutton did not give notice that her leave for a one-day outpatient procedure was FMLA related. . . . Dutton has never produced documentation showing that she provided FMLA notice for her October 2001 absence, while she did provide notice for the earlier unrelated leave.

(Defendant's Opposition at 3-4).

However, because Defendant does not dispute (for purposes of its motion for summary judgment) that Plaintiff engaged in "protected activity" when she took the undesignated leave in October 2001, the court need not decide whether or not this "undesignated leave" was in fact "FMLA leave".

same or equivalent position. However, the court rejects this claim because, in her deposition, Plaintiff admits that after her leave, she returned to her position of non-governmental supervisor (or "business service supervisor") with the same pay, same benefits and in the same department. (Plaintiff's Dep. at 113-14).

Plaintiff also argues in her opposition memorandum that she "suffered adverse employment action August 21, 2001, the day she returned from the first FMLA leave, when she received the violations/performance deficiencies and corrective action." (Plaintiff's Opp. Memo. at 16). However, as a matter of law, simply being written up is not an adverse employment action. In essence, laws against retaliation were "designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (citation omitted).

Thus, the court finds that Plaintiff's termination (on December 4, 2001) is the only adverse employment action she suffered.

Third Prong: *Is there a causal connection between Plaintiff's protected leave and her termination? "No."*

The causal link required by the third prong of the *prima facie* case does not rise to the level of a "but for" standard. *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002). The plaintiff "need not prove that her protected activity was the sole factor motivating the employer's

challenged decision in order to establish the 'causal link' element of a *prima facie* case." *Id.* (citation omitted).

Further, "[c]lose timing between an employee's protected activity and an adverse action against [her] may provide the 'causal connection' required to make out a *prima facie* case of retaliation." *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (citation omitted). But time lapse, while a part of the court's analysis, is not in itself conclusive of the court's determination of causal connection between a protected activity and an adverse employment action. *Shirley v. Chrylser First, Inc.*, 970 F.2d 39, 44 (5th Cir. 1992).

Here, Plaintiff was terminated on December 4, 2001, some 3 1/2 months after she returned to work from FMLA leave on or about August 21, 2001, and approximately 6 weeks after returning to work from the five days Plaintiff took off (from undesignated FMLA leave) in October 2001. Thus, at first blush, the temporal proximity between Plaintiff's protected leave and her termination infers a causal connection.

However, upon closer scrutiny, the court finds that the sole fact that Plaintiff was fired months after her first leave and then weeks after her second leave, does not support a retaliatory motive for two reasons. First, before Plaintiff took her FMLA leave in June 2001, she had received the lowest performance score of any of the supervisors evaluated by Ms. Failla (Failla's Dep. at 178). Evidence that an employer had been concerned about a problem before the employee engaged in protected activity underscores the significance of the temporal connection.

Smith v. Allen Health Systems, Inc., 302 F.3d 827, 834 (8th Cir. 2002).[10]

Second, the relation between the timing of Plaintiff's designated FMLA leave (from June 20, 2001-August 20, 2001) and her termination is not mere coincidence, but actually has a causal explanation that hurts, rather than helps Plaintiff's case. It was during her leave (from June 2001 through August 2001) that contract employees from Advanced Receivables Strategy, Inc. (Ms. Mirck and Mr. Ianni) notified Ms. Failla about numerous deficiencies and issues the [sic] discovered regarding Plaintiff's job performance. "This gives an explanation for the temporal proximity other than a retaliatory motive of the employer." *Id.*[11]

In deciding whether a plaintiff has established an inference of a causal connection, a court should also consider the identity of the final decisionmaker. *See, e.g., Mato v. Baldauf*, 267 F.3d 444, 450 (5th Cir. 2001); *Long v. Eastfield College*, 88 F.3d 30, 306-07 (5th Cir. 1996).

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[10] In *Smith*, the employer, a memorial foundation for a hospital, discharged a long-term employee two weeks after she took FMLA leave. *Smith*, 302 F.3d at 830. The employee's job duties included promptly acknowledging contributions to the Foundation with a receipt and thank you letter. *Id.* Before going on leave, the employer counseled the employee that donors had complained about not receiving acknowledgments. *Id.* at 830-31. While the employee was on leave, undone work dating back as much as two months was discovered in her office. *Id.* at 831. About two weeks after the employee was on leave, she was called in for a meeting and her employment was terminated for failure to send out receipts. *Id.* The Eighth Circuit affirmed summary judgment dismissal, finding that the employee failed to present sufficient evidence of pretext even though the employee was fired at about the same time she took family leave.

[11] *See* fn. 10, *supra*.

Circumstantial evidence of retaliation may include proof that the person whose practices were challenged by an employee was the same person who decided to take an adverse employment action against that employee. *Fieros v. Texas Dept. of Health*, 274 F.3d 187, 193-96 (5th Cir. 2001). That is not the case here, because the person whose practices are challenged by Plaintiff – Mary Failla – recommended Plaintiff's termination, but she was not the final decisionmaker.

In *Mato* and *Long*, the Fifth Circuit expressly held that if a plaintiff's supervisor appeared to have retaliatory animus towards the Plaintiff and recommended to the final decisionmaker that the Plaintiff be fired, the supervisor's retaliatory animus would not be imputed to the final decisionmaker if the employer conducted an independent investigation before reaching a decision. *See Mato*, 267 F.3d at 450; *Long*, 88 F.3d at 306-07.

Here, Failla recommended that Plaintiff be terminated and pursuant to instruction from Lisa Talbot of Tulane Hospital's Human Resources department, she documented this recommendation in Plaintiff's personnel file. Further, Ms. Talbot, Tulane Hospital's Chief Financial Officer (Lee), and Tulane's counsel, conducted an independent review and investigation of whether or not Plaintiff should be terminated.

But even if Ms. Failla had a retaliatory animus towards Plaintiff (which Plaintiff has not shown except through her own self-serving generalized testimony stating her subjective belief that Ms. Failla retaliated against her),[12] Ms. Failla's animus may not be imputed to

[12] *See* Plaintiff's Dep. at 140.

Defendant, because Plaintiff has made no showing that Ms. Failla had influence or leverage over HR Specialist Ms. Talbot, CFO Lee or Defendant's counsel (who were all involved in the decision to terminate Plaintiff). Indeed, at her deposition, Plaintiff denied that either Ms. Talbot or Mr. Lee retaliated against her when she was terminated. (Plaintiff's Dep. at 139-40). Plaintiff also testified at her deposition that she did *not* feel that the ARS representatives (Ms. Mirck and Mr. Ianni), who e-mailed Ms. Failla about Plaintiff's job deficiencies that they discovered while filling in for Plaintiff while she was out on leave from June 20, 2001 to August 20, 2001, were retaliating against her for taking medical leave.[13] (Plaintiff's Dep. at 125-26).

Thus, the court concludes that Plaintiff has failed to present a genuine issue of material fact regarding the necessary causal link. As such, Plaintiff has failed to establish her *prima facie* case and summary judgment is appropriate.

(2) Defendant's proffered reasons for terminating Plaintiff are legitimate and non-retaliatory.

Assuming Plaintiff could establish a *prima facie* case of retaliation, the burden in the adversarial three-step framework of *McDonnell Douglas* shifts to Tulane to state legitimate, non-retaliatory reasons for terminating Plaintiff. According to the summary judgment record, Plaintiff

[13] As previously discussed, Ms. Failla's August 20, 2001 written warning to Plaintiff mirrored the deficiencies discovered by the ARS personnel. (*See* pp. 5-6, *supra*).

was terminated because she failed to meet expectations and for poor performance.

In April 2001, before Plaintiff even requested FMLA leave, she received a "barely satisfactory" job evaluation. (Failla Dep. at 178). In May 2001, major issues (involving problems with collection follow-up) which stemmed (at least in part) from Plaintiff's inadequate job performance as a monitoring supervisor were identified in an internal audit. While on FMLA leave (June – August 2001), numerous job deficiencies were discovered by third-party contractual representatives who were filling in for Plaintiff. After Plaintiff returned from this first leave, she was counseled for numerous deficiencies and was given a corrective action plan. Despite such counseling, Defendant documented continuing problems with Plaintiff's job performance, and Defendant ultimately made the decision to terminate Plaintiff's employment.

The court finds that Defendant's reasons for firing Plaintiff, if believed, would permit the trier of fact to conclude that the decision to fire Plaintiff was legitimate and not retaliatory.[14] Thus, Defendant has carried the burden of production, and the presumption raised by the *prima facie* case is rebutted. Plaintiff was then obliged to present sufficient evidence that (1) creates a question of fact as to whether Defendant's reasons are pretextual *and* (2) creates a reasonable inference that Defendant acted in

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[14] Defendant need not persuade the court that it was actually motivated by its proffered reasons. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179 (5th Cir. 1996). Rather, Defendant's burden at this stage is one of production only, not persuasion, involving no credibility assessments. *Reeves*, 530 U.S. 133, 142 (2000), *citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

retaliation. *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 768 (5th Cir. 2001).

(3) Plaintiff has failed to raise a genuine issue of material fact that Defendant's reasons for terminating her were a pretext for retaliation.

Plaintiff makes several arguments that Defendant's reasons for firing her are untrue. Plaintiff claims that "prior to my leave, my evaluation was not one of dissatisfaction." (Plaintiff's Dep. at 140; Plaintiff's Performance Evaluations of March 2000 and April 2001, Exhibits 12 & 15). Plaintiff also points out that in September and October 2000, her division won a collection contest. (Plaintiff's Opp. at 3, *citing* Plaintiff's Exhibit 13). Plaintiff also wrote several memo's to Mary Failla rebutting the list of deficiencies and corrective action presented to Plaintiff when she returned from leave. (Plaintiff's Exhibit 27 & 31).

Further, Plaintiff maintains that any counseling she received regarding her file tracks was improper because her file tracks "ballooned" (from less than 100 accounts to more than 1,000 accounts) while she was on leave in the summer of 2001. (Plaintiff's Memo of 8/27/01, Plaintiff's Exhibit 29 & Plaintiff's Memo of 10/3/01, Doc. No. 30). Plaintiff also points out that on 9/10/01, she had 1484 accounts, but by 9/28/01, she had worked the number of accounts down to 735. (Plaintiff's Opp. at 9, & Plaintiff's Exhibit 59, p. 6).

Plaintiff also maintains that when she took her second medical leave from October 15-22, 2001, again no one worked her file tracks and they ballooned to 986 accounts

by the time she returned.[15] (Plaintiff's Opp. at 9, and Plaintiff's Exhibit 59 at pp. 6-7). Finally, Plaintiff argues, without evidentiary support, that by the time she was fired, she had reduced her file tracks to under 300.[16] (Plaintiff's Opp. at 10).

Viewing the summary judgment evidence in the light most favorable to Plaintiff, the court finds that Plaintiff has created an issue of fact, albeit weak, as to whether Defendant's reasons were untrue. But as the court next discusses, Plaintiff has woefully failed to present competent summary judgment evidence that creates a reasonable inference that Defendant fired her in retaliation for her taking FMLA leave.[17] Thus, Plaintiff cannot survive summary judgment.[18]

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[15] Plaintiff concedes that Mary Failla e-mailed her on November 1, 2002 and November 9, 2001, asking when her file track (which then had over 1,000 accounts) would be cleaned up. (Plaintiff's Opp. at 10, & Plaintiff's Exhibits 32 & 33). Defendant maintains that many of the unworked accounts reached Plaintiff's file tracks during periods when she was not on leave, and that many of the accounts had never been worked by a collector. (Defendant's Reply at 8, & Defendant's Exhibit V).

[16] While Plaintiff cites Mary Failla's deposition, Ex. 6 at 291-92, in support of this argument, the cited testimony does not support Plaintiff's statement that she had reduced the accounts to 300, by the time she was fired. The court has no duty to search the record for triable issues. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Rather, "[t]he party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his or her claim." *Id.*

[17] Merely disputing Ms. Failla's assessment of Plaintiff's performance does not create an issue of fact as to the pretextual nature of Defendant's explanation for terminating Plaintiff. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002).

[18] "Summary judgment is appropriate in any case 'where critical evidence is so weak or tenuous on an essential fact that it could not

(Continued on following page)

The Fifth Circuit has "repeatedly and emphatically stated that anti-discrimination laws 'are not vehicles for judicial second-guessing of business decisions.'" *Mato v. Baldauf*, 267 F.3d 444, 452 (5th Cir. 2001) (citation omitted). And "[t]he existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification." *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cor. [sic] 1991). "[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason." *Id.*

So, the issue at stake in an employment discrimination or retaliation case is not whether the employer's decision is the correct decision, or a fair decision, or the best decision; rather the issue is whether the employer had a discriminatory or retaliatory motive. *Deines v. Texas Dep't of Protection and regulatory Services*, 164 F.3d 279, 282 (5th Cir. 1999).

Here, even if Defendant's reasons (failure to meet expectations and poor performance) were not the true reasons for terminating Plaintiff, she must still produce *substantial probative evidence* that the real reason for her termination was retaliation for taking FMLA leave. *Chafin*, 179 F.3d at 320. She has not done so at this summary judgment juncture.

As previously discussed, the temporal proximity between Plaintiff's medical leave and termination does

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support a judgment in favor of the nonmovant.'" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) (citation omitted).

not support an inference of retaliatory motive. (*See* discussion *supra*, pp. 20-21).

Further, the only evidence that Defendant retaliated against Plaintiff for taking FMLA leave is Plaintiff's own self-serving generalized testimony stating her subjective belief that her supervisor, Mary Failla, retaliated against her. (Plaintiff's Dep. at 140). But, again as previously discussed, even if Ms. Failla had a retaliatory animus towards Plaintiff, such animus cannot be imputed to Defendant because the decision to terminate Plaintiff was independently reviewed by Defendant's Human Resources Specialist, its Chief Financial Officer and its legal counsel. (*See* discussion *supra*, pp. 21-23).

Further, in her deposition, Plaintiff could point to no employee at Tulane who had been fired, demoted or given a pay cut for taking FMLA leave. (Plaintiff's Dep. at 141-43). And while Plaintiff attaches to her opposition, the Affidavits of individuals who claim that Ms. Failla did not like employees taking FMLA leave, there are no allegations in these affidavits that those individuals were fired or otherwise punished for taking FMLA leave. (*See* Affidavits of Karen Erin and Rose Kline, Plaintiff's Exhibits 63 & 64). Further, these Affidavits set forth irrelevant and immaterial allegations, conclusions, state opinions and contain hearsay, and thus they constitute incompetent summary judgment.[10] *Ragas*, 136 F.3d at 458.

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[10] In a Minute Entry issued simultaneously with this Minute Entry, the court granted Defendant's Motion to Strike the Affidavit of Rose Kline, because Plaintiff did not timely list her as a Trial witness. (*See* Minute Entry, Doc. No. 62).

Similarly, Plaintiff attaches to her opposition her own Affidavit, which contains hearsay, conclusory allegations and speculation regarding her employment at Tulane and another employee who took FMLA leave. (Plaintiff's Exhibit 65). As such, it is incompetent summary judgment evidence.[20] *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987).

A reasonable factfinder after carefully reviewing the competent summary judgment evidence could not properly conclude that Defendant's proffered reasons for terminating Plaintiff were false *and* that the real reason was retaliation for taking FMLA leave.[21] In *Reeves*, the Supreme Court observed: "Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject a defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. Such is the case here.

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[20] The court also strikes Plaintiff's Affidavit to the extent that it impeaches her prior deposition testimony. *See also* fn. 5, *supra*.

[21] Plaintiff included in her Exhibits attached to her opposition, a Department of Labor internal narrative report regarding the FMLA charge Plaintiff filed against Tulane. (Plaintiff's Exhibit 62). As previously noted, in a Minute Entry issued simultaneously with this Minute Entry, the court granted Defendant's Motion to Strike this DOL report as untimely. (*See* fn. 7, *supra*). However, even if the court would consider this exhibit (over Defendant's objections that it is also inadmissible, untrustworthy and lacking in probative value), the consideration of this report, with all of the other summary judgment evidence contained in th [sic] record, would not alter the court's ultimate conclusion that Defendant is entitled to summary judgment dismissal of Plaintiff's FMLA claims.

Accordingly;

IT IS ORDERED that Defendant's **"Motion for Summary Judgment"** be and is hereby **GRANTED**, dismissing all of Plaintiff's claims.

IT IS FURTHER ORDERED that Plaintiff's **"Cross-Motion for Partial Summary Judgment"** be and is hereby **DISMISSED**.

* * *

/s/ A.J. McNamara

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AMANDA DUTTON	*	CIVIL ACTION
VERSUS	*	NO: 03-2084
UNIVERSITY HEALTHCARE SYSTEM, L.L.C., ET AL	*	SECTION: "D"(4)
	*	

JUDGMENT

(Filed May 12, 2004)

For reasons set forth in this court's Minute Entry of May 12, 2004 (Doc. No. 63), wherein the court granted the Motion for Summary Judgment filed by Defendant,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor [sic] Defendant, University Healthcare System, L.L.C. d/b/a Tulane University Hospital and Clinic, and against Plaintiff, Amanda Dutton, dismissing all of Plaintiff's claims, with prejudice and at Plaintiff's costs.

New Orleans, Louisiana, this 12th day of May, 2004.

/s/ A.J. McNamara
A.J. McNAMARA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

EXHIBIT 65

AFFIDAVIT OF ROSE KLEIN

The affiant, Rose Klein being duly sworn upon oath, deposes and states as follows:

1. I am currently employed as a biller with BEA Medical Billing, located at 13222 Highway 90, Ste B, Boutte, Louisiana. I have been employed there for the past two months. The phone number is 985/785-2221.

2. From September of 1999 through August of 2003, I worked for Tulane University Hospital and Clinic (Tulane). I began my employment as the Admitting Manager, progressing to the Assistant Director of Admitting.

3. As the Assistant Director of Admitting, my duties included all points of registration for the hospital and clinics and the emergency room. During the last approximately two years of my employment with Tulane, I reported directly to Mary Failla, the Director of Tulane's Business Services Department.

4. In 2001, I was diagnosed with severe arthritis in the knees. The problem became so bad that I had to use the assistance of a cane in order to walk. When I was diagnosed, my doctor told me that I would eventually need a knee replacement and would need to be off work for 6-8 weeks. In the mean time, the doctor gave me shots to alleviate the pain. On one occasion my doctor filled out a medical certification form needed for Tulane's Family Medical Leave forms.

5. I informed Mary Failla when I found out I was in need of knee replacement surgery. Mary told me it was not a good time for me to be off work because she needed

me in the department too badly. Mary asked me if I could treat my knees in a different fashion.

6. There were times in meetings when they or others in the meeting would ask me about my knees. I would reply that I needed to have knee replacement surgery but my boss would not let me take the time off. In one such meeting, attendees included Melissa Griffin, Suzanne Haggard, and Pete Olivier. Attendees in these meetings would refer to Mary as a slave driver. I went to Mary on at least three occasions during the two year period I reported to her to talk about when I could take the time off. Each time Mary told it was not a good time because I was needed at work. Each time, I accommodated Mary's request.

7. On one occasion, I had the opportunity to talk with Lisa Talbot in Human Resources. I asked Lisa questions about the Family Medical Leave Act. I asked her about the Family Medical Leave provision regarding key employees. I also told Lisa that I needed knee replacement surgery, but Mary always told me it was not a good time for me to be off work. Lisa told me that it may be possible for Mary to replace me if I went on leave because of the key employee provision. Talbot advised me to talk to Mary about taking the leave but at no time did Talbot tell me I had the right to take FMLA leave. At the time, I earned approximately $60,000 per year.

8. On or about June or July of 2003, I received a glowing performance appraisal and a wage increase of $1.50 per hour. In August of 2003, Mary terminated my employment for poor performance.

FURTHER AFFIANT SAYETH NAUGHT.

Dated, this 12th day of
April, 2004.

/s/ Rose Klein
Rose Klein

Witnessed by Tracie Jackson, Notary Public this 12th day of April 2004.

/s/ Tracie Jackson
Tracie Jackson, Esq.

Supreme Court U.S.
FILED
OCT 28 2005
CLERK

No. 05-262

IN THE

Supreme Court of the United States

AMANDA DUTTON,

Petitioner,

v.

UNIVERSITY HOSPITAL CARE SYSTEMS, L.L.C. D/B/A TULANE UNIVERSITY HOSPITAL AND CLINIC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in disregarding an affidavit submitted in opposition to a summary-judgment motion on grounds that it was untimely, irrelevant, and immaterial.

2. Whether the district court properly granted summary judgment dismissing petitioner's claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.*, and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*

LIST OF INTERESTED PERSONS AND RULE 29.6 NOTATION

The parties to the proceedings below were petitioner-plaintiff, Amanda Dutton, and respondent-defendant, University Healthcare System, L.C., doing business as Tulane University Hospital and Clinic. University Healthcare System, L.C., is a joint venture between The Administrators of the Tulane University Educational Fund and Columbia/HCA of New Orleans, Inc.

Galen Holdco, LLC owns 100% of the stock of Columbia/HCA of New Orleans, Inc. Healthtrust, Inc. – The Hospital Company owns 100% of the membership interest of Galen Holdco, LLC. HCA Inc., a publicly traded company, owns 100% of the common stock of Healthtrust, Inc. – The Hospital Company.

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STATEMENT OF THE CASE

Respondent, University Healthcare System, L.C. d/b/a Tulane University Hospital and Clinic ("Tulane Hospital" or "Tulane"), adopts and incorporates by reference the Fifth Circuit's statement of the course of proceedings and the undisputed facts as set forth in its unpublished opinion below. *See* Dutton Appendix at 1-19. They need only be restated briefly here.

Petitioner, Amanda Dutton, filed suit against Tulane Hospital, her former employer, asserting claims under the FMLA and ADA. She alleged that Tulane had discriminated against her in violation of the FMLA by discharging her from employment after she had returned from medical leave and in violation of the ADA because of a "perceived disability." The district court rendered summary judgment in favor of Tulane and against Dutton, dismissing all of her claims with prejudice, and further granted Tulane's motion for attorney's fees and expert costs under 42 U.S.C. § 12205, upon concluding that Dutton's ADA claim was frivolous, unreasonable, or without foundation.

The Fifth Circuit affirmed the district court's judgment, concluding that Tulane had supported its motion for summary judgment with competent evidence of legitimate business reasons for terminating Dutton because she had performed her work poorly and had failed to meet her supervisor's work expectations. The court of appeals stated that Dutton had not marshaled "sufficient objective evidence to allow for a reasonable inference that Tulane was motivated by retaliation," because she had exercised her rights under the FMLA and that "plaintiff's deposition testimony acts to suck the remaining air propelling her claim, completely out of her

sails." *See* Dutton Appendix at 14-15. The Fifth Circuit likewise concluded that Dutton had failed to establish a "disability" under the ADA and had produced no evidence to raise a genuine issue of material fact that Tulane had ever "regarded" her as disabled. *Id.* at 17. It affirmed the district court's award of attorney's fees and awarded Tulane an additional amount for defending against Dutton's ADA claim on appeal.

Tulane Hospital hired Dutton in March 1999 as a supervisor in its Business Services Office, which collected fees that Tulane Hospital earned by providing medical care to patients. Dutton later became responsible for non-governmental collections and reported to Mary Failla, Tulane Hospital's business-office director. Because of problems in Dutton's collection group, Failla hired an outside consulting firm to provide two trainers to work with Dutton and her collection staff on a daily basis in October-December 2000. Failla documented further shortcomings in Dutton's performance in January 2001 and discussed them with her.

In April 2001, Dutton received a performance evaluation of "2," the lowest she received at Tulane Hospital and also the lowest of any of the supervisors who reported to Failla. Dutton rated herself as "does not meet" expectations in the area of monitoring activities and work assignments for accuracy, timeliness, and compliance with department standards. In May 2001, financial analysts later issued an audit report and review likewise finding deficiencies in Dutton's collection area. Dutton admitted that the internal audit was correct.

From June 20, 2001, through August 20, 2001, Tulane Hospital granted Dutton's request for leave under the FMLA

for gynecological surgery. Dutton had originally requested a shorter time period, but Tulane extended the leave fourteen days. Failla approved the leave request. After the surgery, Dutton's physician advised Tulane Hospital that he expected Dutton to completely recover and return to full activity. Unbeknownst to Tulane, Dutton had actually worked part-time during her FMLA leave for another employer on shifts as a pharmacy technician, even though she would later assert that she was unable to work.

While Dutton was absent on FMLA leave, Tulane Hospital used the services of a contract agency. It discovered yet more serious insufficiencies in Dutton's job performance, including mail and correspondence that Dutton had received as far back as 1999 but had never opened. Failla warned Dutton in writing in August 2001, advising her of 11 areas of deficiency and informing her that future performance issues would result in additional disciplinary actions, including the possible termination of her employment.

From October 15 to October 22, 2001, Dutton was absent for work with permission to undergo a single day of outpatient diagnostic procedures. Neither Dutton nor the hospital designated her absence as family medical leave.

On November 1, 2001, Failla reviewed Dutton's accounts and found that she had failed to properly supervise the collection of over one thousand accounts within her department's responsibility. They totaled over $556,000 in uncollected funds. Failla asked Dutton to rectify the problem by November 9, 2001, but she failed to do so.

On December 4, 2001, Dutton met with Failla and Tulane's employment-relations representative, who explained

to her that her employment was being terminated because of her poor work performance and failure to meet expectations. Dutton appealed the discharge by writing to Tulane Hospital's interim chief financial officer, who conducted his own independent investigation and concluded that Dutton's termination was appropriate. Dutton thereafter appealed the decision to Tulane's president and chief executive officer, who also independently reviewed it and found no evidence sufficient to overturn it. In her deposition, Dutton admitted that Tulane's employee-relations specialist, the CFO, and the president/CEO, the ultimate decision makers, had not retaliated against her for taking FMLA leave.

Dutton further presented no evidence to support her unfounded allegation under the ADA that Tulane had terminated her because it "perceived" or "regarded" her as disabled and substantially limited in her ability to work at a class of jobs or broad range of jobs. Dutton's own doctor had informed Tulane Hospital that she could return to work with no restrictions after her surgery. Dutton only subjectively believed that her supervisor Mary Failla was thinking of her as "disabled" because she had taken brief absences from work for medical procedures. In addition, Dutton never filed a charge of ADA discrimination as required by law before she filed suit.

REASONS FOR DENYING THE PETITION

I. The District Court Did Not Abuse Its Discretion in Refusing to Consider an Untimely, Irrelevant, and Immaterial Affidavit in Opposition to the Motion for Summary Judgment

Dutton first argues that "review is warranted to resolve whether Fed. R. Civ. P. 56(e) requires the name of an affiant be included as a witness on a witness and exhibit list in order for the affidavit to be considered as evidence in summary judgment proceedings." This contention presents no issue worthy of the Court's review.

First, Dutton did not raise this question in the lower courts. In her brief on appeal, Dutton conceded that the trial judge had discretion under Fed. R. Civ. P. 16 to strike the affidavit of Rose Kline and disregard it as summary-judgment evidence because Dutton had failed to comply with the Court's case scheduling order requiring her to complete discovery and timely list all witnesses. Dutton merely contended on appeal that the judge had abused that discretion. In her certiorari petition, she now claims for the first time in this litigation that Rule 56(e) "requires" the trial court to consider the excluded affidavit. But she cited no such authority in the lower courts and never presented the issue to them for their decision. Having failed to raise and preserve the question below, Dutton cannot now raise the issue as a ground for this Court to grant certiorari. As this Court has stated, a question presented in a petition for certiorari but not raised in the Court of Appeals "is not properly before us." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Second, even if Dutton had preserved her Rule 56(e) argument, it is meritless. Nothing in Rule 56 prevents a district judge from exercising discretion under Rule 16 to control the court's docket through a scheduling order. Rule 16 provides that a district judge shall enter a scheduling order and that such orders "shall not be modified except upon a showing of good cause and by leave of the district judge [.]" In this case, the district court entered such an order. *See* Dutton Appendix at 22-23. Nevertheless, Dutton violated the scheduling order and attempted to offer the affidavit of Rose Kline on her own accord and without a motion for good cause. *Id.* at 24-25.

Moreover, Rule 56(e) requires an affidavit to "set forth facts as would be admissible in evidence." The Kline affidavit set forth totally irrelevant and immaterial allegations, conclusions, opinions and hearsay about Kline's own employment. As Dutton acknowledged in her own deposition, she could point to no Tulane employee who had been fired, demoted, or given a pay cut for taking FMLA leave. Dutton herself testified that no one made any jokes about her medical leave and that no manager or director at Tulane Hospital had ever said any thing derogatory about it. Kline's affidavit therefore had no relevance or probative value. Even though the district court also struck the Kline affidavit, the court nonetheless considered the vague and immaterial assertions contained in it and found it to be irrelevant and incompetent summary-judgment evidence. *See* Dutton Appendix at 54. The Fifth Circuit's opinion likewise recognized that unsupported allegations or affidavits or deposition testimony are insufficient to defeat a motion for summary judgment. *Id.* at 14.

Under Rule 56(e), to defeat a well supported motion for summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial, not merely "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Kline affidavit was untimely, irrelevant, and immaterial to Tulane's motion for summary judgment and created no genuine issue for trial. It likewise creates no ground for this Court's review.

II. The District Court Properly Granted Summary Judgment Dismissing Petitioner's FMLA and ADA Claims

In her second argument at page seven of her petition, Dutton contends that this Court should grant certiorari because of an alleged split in the circuits about "whether proof of mendacity is sufficient to present an employment retaliation and discrimination case to the jury under Rule 56." Again, Dutton states no valid reason for this Court to grant review.

This case does not involve a conflict between the circuits. In analyzing Dutton's claims and Tulane's motion for summary judgment, the Fifth Circuit properly articulated this Court's standards of review in discrimination cases:

> A plaintiff seeking to survive summary judgment . . . must point to some evidence establishing that the employer's proffered reasons are pretextual.

[Citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002).] In some instances, proof of pretext alone will be sufficient to preclude summary judgment. *Reeves*, 530 U.S. at 143 (stating that "a plaintiff's prima facia case, combined with sufficient evidence to find that the employer's asserted justification is false, *may permit* the trier of fact to conclude that the employer unlawfully discriminated") (emphasis supplied); *cf. Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 903 (5th Cir. 2000) (observing that it is "possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination"); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 371 (5th Cir. 1997). Indeed, the Supreme Court has instructed that, "[c]ertainly there will be instances where, although the plaintiff has established a prima facia case and set forth sufficient evidence to reject the defendant's case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder would conclude that the action was *discriminatory*." *Reeves*, 530 U.S. at 143 (emphasis supplied). *Reeves* suggests that whether a plaintiff can survive summary judgment must be decided on a case-by-case analysis, determinative of a number of factors, including, "the strength of the prima facia case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the

> employer's case and that properly may be considered." *Id.* at 148-149. The ultimate burden of persuasion lies "at all times with the plaintiff." *Id.* at 143.

See Dutton Appendix at 8-9. Applying these legal standards, the Fifth Circuit conducted a "careful review of the entire record" and correctly concluded that Dutton had failed to provide sufficient evidence of an FMLA retaliation claim under the specific facts of her case to survive Tulane's well-supported motion for summary judgment. *See* Dutton Appendix at 16-17. The decisions of the district court and the Fifth Circuit in this case are consistent with this Court's analysis in *Reeves*.

Tulane presented overwhelming evidence in support of its motion for summary judgment, documenting Dutton's chronic work-performance problems before and after her medical leave. In contrast, Dutton failed to provide any competent, relevant evidence to support her claims of discrimination under either the FMLA or the ADA. Indeed, as the court of appeals correctly recognized, Dutton's own deposition testimony refuted her claim of FMLA retaliation. *See* Dutton Appendix at 10 n.4, 15-16. Dutton's attempted rebuttal consisted only of "naked assertions, unsubstantiated by the record." *Id.* at 14. The Fifth Circuit likewise observed that "Dutton's own deposition testimony cited above acts as her Achilles heel" and that she "virtually admits she had no ADA claim." *Id.* at 18. Furthermore, in addition to finding the ADA claim meritless, the district court correctly held that it was time-barred. *See* Dutton Appendix at 37-41. Both of the courts below properly awarded Tulane statutory attorney's fees under 42 U.S.C. § 12205, recognizing that Dutton's ADA claim was so totally devoid of merit that she should never have persisted in litigating it.

The foregoing indisputable facts readily refute Dutton's unsubstantiated assertions at page three of her petition that "without prior warning, [she] received written disciplinary action for alleged poor performance", that "Failla left Dutton's accounts uncollected while she was on leave", that "Dutton's counterpart, Collection Supervisor Sarah Lewis, performed at lower levels than Dutton, and was not disciplined", and that "Dutton had no previous written warnings or disciplinary actions regarding her work in her personnel file." *Id.* Dutton's job-performance problems were documented before and after her medical leave, and Tulane gave her multiple chances to improve before terminating her employment.

Based on these undisputed facts and the controlling law, this was a classic case for a summary judgment of dismissal in any circuit. The result would be the same regardless of the venue. Numerous other courts have granted summary judgments under similar circumstances. *See, e.g., Smith v. Allen Health Sys., Inc.*, 302 F. 3d 827 (8th Cir. 2002) (before employee left on FMLA leave, employer had counseled her about delays in doing her work and later discovered undone work dating back as much as two months); *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 10 (1st Cir. 2001) (adverse actions taken against employee were part of employee's deteriorating relationship with employer that began before employee took FMLA leave); *Matthews v. Independence Blue Cross*, 2002 WL 7930 (E.D. Pa. Dec. 28, 2001) (unfinished work, including unprocessed and outdated documents, were discovered during employee's FMLA leave).

Dutton's inconsistent positions in this lawsuit likewise undermine her petition for certiorari. Dutton did not present her conflict-of-decision arguments to the court below, nor

raise any question about interpretive regulations from the Equal Employment Opportunity Commission. At page nine of her certiorari petition, she now alludes to alleged evidence of her "inability to work at all while in surgery, while recuperating from surgery, and during additional testing[.]" Yet, in the trial court, Dutton had asserted that Tulane knew about her two outside jobs. And, she testified in her deposition about her third job during medical leave. Had Tulane known of Dutton's moonlighting while on leave for medical reasons, it would have discharged her from her employment. For this reason, the Magistrate Judge in the trial court allowed Tulane to add an affirmative defense of after-acquired evidence to its answer. These examples of Dutton's groundless and contradictory positions led the Chief Judge of the Eastern District of Louisiana and a three-judge panel of the Fifth Circuit to conclude that attorneys' fees were warranted under 42 U.S.C. § 12205 on the dismissal of Dutton's baseless ADA claim.

Significantly, Fifth Circuit Rule 47.5 requires publication of an opinion when it "[c]reates or resolves a conflict of authority within the circuit or between this circuit and another" or "[c]oncerns or discusses a factual or legal issue of significant public interest." In this case, Chief Judge King and Judges Benavides and Stewart of the Fifth Circuit unanimously decided not to publish their decision because it raised no issue of any importance beyond the dispute between the party litigants. Under Fifth Circuit Rule 47.5, "[t]he publication of opinions that merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." A case such as this is certainly not worthy of review by this Court. *See* R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, 459 (8th ed. 2002).

The Fifth Circuit correctly recognized this case for what it is – a meritless suit ripe for dismissal by summary judgment and affirmance on appeal in an unpublished opinion, because plaintiff had no competent evidence to raise a genuine issue of material fact for trial or prove the essential elements of her claims. For the same reasons, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, Respondent, University Healthcare System, L.C. d/b/a Tulane University Hospital and Clinic, respectfully asks this Court to deny Dutton's Petition for Writ of Certiorari.

Respectfully submitted,

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